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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

UNIROYAL, INC. and UNIROYAL CHEMICAL CO., INC.

Petitioners,

v.

JESSE T. DUKE and SIDNEY W. FOX,

Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In an employment discrimination action under *McDonnell Douglas* in which the employer articulates multiple legitimate, nondiscriminatory reasons for the adverse employment decision and in which the plaintiff seeks to demonstrate pretext indirectly by discrediting them, must the plaintiff present evidence discrediting all of the employer's articulated reasons?

II. In reviewing the evidence on a motion for directed verdict or a motion for judgment notwithstanding the verdict, should the court review all of the evidence or only that evidence which was favorable to the non-moving party in determining whether evidence was presented from which a reasonable jury could have found for the non-moving party?

III. Is evidence of adverse employment decisions involving other employees within the protected class admissible in an individual disparate treatment action to show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination and absent any other evidence of a general policy or practice of discrimination?

RULE 29.1 DISCLOSURE

Neither Uniroyal, Inc. nor Uniroyal Chemical Company, Inc. have a parent company or nonwholly owned subsidiary.

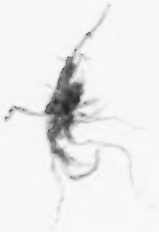


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OPINIONS BELOW

The Court of Appeals' opinion, as amended, is reported at 928 F.2d 1413. App. A (opinion); App. B (amendment).

JURISDICTION

The Court of Appeals' judgment was entered on April 1, 1991. A petition for rehearing was denied on May 31, 1991. App. C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTE

The plaintiffs' claims arise under the Age Discrimination in Employment Act (ADEA), as amended, 29 U.S.C. § 623(a)(1):

> (a) It shall be unlawful for an employer-
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

STATEMENT OF THE CASE

Overview. This case presents fundamental questions as to the plaintiff's burden under *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), of rebutting the employer's articulated legitimate, nondiscriminatory reasons for an adverse employment decision; the proper scope of a court's review of the evidence in determining whether it is sufficient to permit a reasonable inference that the employer's articulated reasons are pretext for discrimination; and, the role of anecdotal evidence (*i.e.*, adverse employment decisions involving other employees within the protected-class) in demonstrating pretext in an individual disparate treatment case.

Here, a panel of the court of appeals affirmed a jury verdict[1] that Uniroyal violated ADEA when it terminated the respondents, Jesse T. Duke and Sidney W. Fox, during a work force restructuring and reduction.

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[1]Jurisdiction of the United States District Court for the Eastern District of North Carolina was invoked under 28 U.S.C. § 1331.

The panel found that the restructuring and reduction was precipitated by weakening market conditions and a leveraged buy out (LBO) arising from a hostile takeover attempt. App.5. It also found that Uniroyal had articulated legitimate, nondiscriminatory reasons for selecting the respondents for termination, *i.e.*, that they were the least qualified for Uniroyal's existing and future needs. App.10. It held, however, that the respondents satisfied their burden of showing that these reasons were pretextual by presenting evidence as to job performance and, in Fox's case, familiarity with certain Uniroyal products from which a reasonable jury could have found that they were better qualified than those retained. Job performance and product familiarity[2] were not the only reasons, however, which Uniroyal articulated for determining that the respondents were the least qualified--education and research and technical training were also articulated as reasons. Nevertheless, the panel did not require any showing whatsoever that the education and research and technical training reasons were pretextual and, thus, allowed the respondents to prevail using the *McDonnell Douglas* three-stage proof scheme without rebutting all of Uniroyal's articulated reasons.

The first question presented concerns whether - and in what circumstances - a plaintiff who relies on the *McDonnell Douglas* three-stage proof scheme may be

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[2]Uniroyal never articulated "product familiarity" as a reason for selecting the respondents as the least qualified. It did, however, base its decision as to which employees were the least qualified, in part, on expertise on new products or the crops on which or geographical area in which Uniroyal sought to develop them. Nevertheless, the panel apparently found Fox's evidence as to his "familiarity" with certain products sufficient to rebut Uniroyal's new product, crop and geographical area expertise articulated reason.

relieved of the burden of rebutting all of the employer's articulated legitimate, nondiscriminatory reasons for the employment decision.

In *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), this Court set out a three-stage proof scheme which allows a plaintiff to establish discriminatory intent without presenting any evidence that the employment decision was based on an impermissible factor, such as race, gender, religion, age.[3] As this Court explained in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the *McDonnell Douglas prima facie* case initially raises a rebuttable inference of discrimination "only because we presume these [alleged discriminatory] acts, *if otherwise unexplained*, are more likely than not based on ... impermissible factors." *Furnco*, 438 U.S. at 577; *Burdine*, 450 U.S. at 254 (emphasis added).

Once the employer articulates legitimate, nondiscriminatory reasons for the acts, the inference of discrimination is rebutted, however, and the plaintiff must then demonstrate that the articulated reasons were pretextual. *Burdine*, 450 U.S. at 256. If the plaintiff satisfies this burden--either, directly, by showing that as between age and the specific articulated reasons, age more likely motivated the employer or, indirectly, by showing that the specific articulated reasons are unworthy of

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[3]First, the plaintiff must establish a *prima facie* case of discrimination. If he succeeds, then the employer must articulate some legitimate, nondiscriminatory reason for the adverse decision. Once the employer does so, the plaintiff must then prove that the articulated reasons were not the true reasons for the adverse decision but were a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802, 804.

credence--then the inference of discrimination is resurrected because "when all legitimate reasons ... have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration..." *Furnco*, 438 U.S. at 577. *See also Furnco*, 438 U.S. at 580 ("we infer discriminatory animus because experience has proved that in the *absence* of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.")(emphasis added).

The first question before this Court which it has never expressly addressed is whether, in cases in which the employer articulates multiple legitimate, nondiscriminatory reasons and the plaintiff seeks to demonstrate pretext indirectly by discrediting them, the plaintiff must present evidence discrediting all of the articulated reasons or whether he may satisfy his burden by presenting evidence discrediting less than all of them. Absent explicit guidance from this Court, the lower courts have adopted different approaches. Some, like the panel here, have departed from this Court's precedents by allowing a plaintiff to satisfy his burden by discrediting less than all of the employer's articulated reasons. Others following this Court's precedents require him to discredit them all. The conflicts among the lower courts and the need for a definitive resolution by this Court are discussed below. First, however, the other questions presented and material facts are briefly described.

The second question presented concerns the articulated legitimate, nondiscriminatory reasons on which the panel here held that the respondents presented evidence from which a reasonable jury could have found pretext for age discrimination (*i.e.*, job performance and product

familiarity[4]). The panel's determination of what a reasonable jury could have inferred was based only on the evidence which the panel deemed favorable to the respondents and not all of the evidence that was in fact presented to the jury. In so restricting its review of the evidence, the panel stated that it was to act "clinically in marshalling the evidence presented in favor of plaintiffs and disregard the substance of the evidence offered by Uniroyal. We also must assume that the testimony in favor of plaintiffs was credible unless totally incredible on its face and ignore evidence offered to rebut it." App.11. Accordingly, the second question before this Court is whether in reviewing the evidence on a motion for directed verdict or judgment notwithstanding the verdict to determine whether evidence was presented from which a reasonable jury could have found for the non-moving party, the court must consider only the evidence favorable to the non-moving party, as the panel did here, or whether it should consider all of the evidence.[5]

As to this question, there is a confusing series of conflicts among the circuits. Some have held that the court must consider *all* the evidence presented by both parties, the movant and non-movant. Others have held that the court should consider evidence which is favorable to the non-movant along with any undisputed, unfavorable evidence. The panel here, however, adopted a third view, stating that the court must view only the evidence which

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[4] See footnote 2.

[5]Uniroyal recognizes that the court must view the evidence in the light most favorable to the non-moving party. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The question presented here, however, is whether this review is based on all evidence or only that which is favorable to the non-moving party.

was favorable to the non-movant and disregard any unfavorable evidence, whether disputed or not. Not only is there no uniformity among the circuits, but there is none within certain circuits.[6]

The Fourth Circuit has apparently joined those circuits in which no uniformity exists. Previous Fourth Circuit decisions held that when reviewing the sufficiency of the evidence the court was to consider *all* the evidence, both favorable and unfavorable to the non-moving party. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 243 n.14 (4th Cir. 1982)(ADEA)("courts are to consider ... all the evidence, not just that favorable to the non-mover."); *Grooms v. Minute-Maid*, 267 F.2d 541, 543 (4th Cir. 1959)("[t]he evidence ... must be considered as a whole"). The panel here, however, departed from this approach and adopted what now appears to be the Fourth Circuit

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[6] For example, in 1963 and 1969, the Seventh Circuit embraced the approach of considering all the evidence; subsequently, in 1979, it adopted the approach of considering all favorable evidence to the non-movant along with any undisputed, unfavorable evidence to the non-movant. *Compare Pinkowski v. Sherman Hotel*, 313 F.2d 190, 192 (7th Cir. 1963) and *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 288 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969) *with Hampton v. Hanrahan*, 600 F.2d 600, 608 (7th Cir. 1979), *modified*, 446 U.S. 754, *reh'g denied*, 448 U.S. 913 (1980).

Likewise, the Eighth Circuit has at times adopted the approach of considering all the evidence and at other times adopted the approach of considering only the evidence favorable to the non-moving party. *Compare Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 473 (8th Cir. 1987) *and Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 671 (8th Cir. 1985) *and SCNO Barge Lines v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192 (8th Cir. 1984) *with Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990) *and Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), *reh'g denied per curiam*, 728 F.2d 976 (8th Cir. 1984).

approach of reviewing only the evidence favorable to the non-moving party. App.11.

The third question presented concerns whether evidence of adverse employment decisions involving other employees in the protected class is admissible in an individual disparate treatment action to show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination and absent any other evidence of a general policy or practice of discrimination. The panel here not only upheld the admission of such evidence, but relied on it, in part, in affirming the jury verdict, noting that among other things "Uniroyal discharged the oldest sales *representatives* in Region 13 ..." (emphasis added) App.11; *see also* App.5.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court noted that although a general policy or practice of discrimination is not controlling in an individual discharge case, it may be relevant to showing pretext. *Id.* at 805 n.19. *McDonnell Douglas* and *Teamsters v. United States*, 431 U.S. 324 (1977), teach that a general policy or practice of discrimination can be demonstrated by statistics which show that the adverse decision conforms to a general pattern of discrimination, *McDonnell Douglas*, 411 U.S. at 805, or other evidence sufficient to show that "discrimination was the company's standard operating procedure - the regular rather than the unusual procedure"--the mere occurrence of isolated or sporadic discriminatory acts, however, is insufficient, *Teamsters*, 431 U.S. at 336.

This Court has not yet addressed whether-and in what circumstances-evidence of adverse employment decisions involving other employees in the protected class is admissible in an individual disparate treatment case to

show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination and absent any other evidence of a general policy or practice of discrimination.[7] Absent explicit guidance from this Court, the lower courts have adopted several approaches. Some exclude such evidence because it fails to establish a pattern or practice of discrimination and thus is not probative of discriminatory intent as to the adverse decision affecting the plaintiff. Others, like the panel here, admit such evidence notwithstanding its insufficiency in establishing a pattern or practice of discrimination and simply allow the factfinder to consider it together with all other evidence in determining discriminatory intent. In some circuits, there appears to be no uniform approach to the probative value and admissibility of such evidence.

Material Facts. In 1985, the respondents were terminated from their employment in Uniroyal's Crop Protection Division during a work force restructuring and reduction which was precipitated by weakening market conditions and an LBO. Both of them worked in the southeast United States ("District 13"). Duke was a sales representative in northeast North Carolina. Fox was a development representative in southern Georgia. Upon termination, neither respondent was replaced; instead, their territories were consolidated with adjacent territories and the employees who had been assigned to the adjacent

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[7] Uniroyal recognizes that anecdotal evidence may be used to bolster statistical proof of a pattern or practice of discrimination. *See, e.g., Teamsters*, 431 U.S. at 339 (allowing testimony about individual discriminatory acts to bring "the cold numbers convincingly to life.") The question presented here, however, is whether such anecdotal evidence is probative of pretext and thus admissible in an individual disparate treatment action *absent* statistical evidence or other evidence of a general policy or practice of discrimination.

territories assumed responsibility for the consolidated territories.

Historically, sales representatives' responsibilities included, among other things, account responsibilities for each customer within an assigned geographic territory, management of marketing plans and interaction with a development representative counterpart to optimize sales in the territory. Historically, development representatives played two roles--product development and sales support. In the product development role, they introduced new products from research into the marketplace by conducting field evaluations and working with university and cooperative groups to obtain recommendations for the products' use. In the sales support role, they optimized product sales by assisting sales representatives on technical issues relating to products and providing support on product complaints.

The panel found that Uniroyal articulated legitimate, nondiscriminatory reasons for selecting the respondents for termination, *i.e.*, that they were the least qualified for Uniroyal's existing and future needs. App.10. Although it addressed the comparative qualifications of the respondents and employees who were retained solely in terms of job performance and, in Fox's case, familiarity with certain products (App.11),[8] Uniroyal also articulated other reasons for determining that the respondents were the least qualified for existing and future needs--namely, inferior education and research and technical training.

Education and research and technical training were emphasized in the restructuring and reduction because of

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[8]See footnote 2.

Uniroyal's decision to shift its emphasis from selling a mature product line to research and development of new formulations and products in response to newly introduced competitive products in the marketplace. This shift not only heightened the need for education, research and technical skills (particularly, qualifications involving weed science and entomology) among the development representatives who would focus on this research and development, but also among the sales representatives who would assume more of the sales support duties that development representatives had historically handled.

The two younger development representatives, Dr. Nester and Dr. Farlow, who were retained in the District 13 development organization after the restructuring and reduction, both possessed scientific training and research experience that was superior to Fox's training and experience.[9] Fox did not possess a graduate degree or a Weed Science or Entomology specialty and had not published scientific articles or supervised or worked at a research facility. Trial Tr. 283-7, 319. Dr. Nester, in contrast, possessed a Ph.D. in Weed Science entailing extensive crop protection research and the publication of 16 scientific articles. Def. Ex. 27; Trial Tr. 982. Moreover, he had supervised a Uniroyal research farm where he researched compounds and initially evaluated them for crop application feasibility. Trial Tr. 972-3. Dr. Farlow also possessed superior research training and experience. He possessed a Ph.D. in Entomology and had published seven scientific articles. Def. Ex. 25; Trial Tr. 988-91, 1090, 1149. Moreover, he had supervisory

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[9]The third development representative, Sheron McIntire, who comprised the District 13 organization after the restructuring and reduction was older than Fox.

experience with a consulting firm that performed research with Dimilin, a Uniroyal product, and plant growth regulants. Trial Tr. 983-4. The sales representatives who were retained in the District 13 sales organization after the restructuring and reduction likewise possessed educational qualifications superior to Duke's. Unlike these individuals, Duke had no post-high school education.

Notwithstanding Uniroyal's articulation of education and research and technical training as a reason for determining that the respondents were the least qualified for existing and future needs, the panel held that the respondents satisfied their burden of demonstrating that Uniroyal's articulated reasons were pretext by presenting evidence as to job performance and, in Fox's case, familiarity with certain products.[10]

The panel also held that this evidence of job performance and product familiarity[11] when considered without regard to other evidence of job performance which was unfavorable to the respondents was sufficient to allow a reasonable inference of pretext. App.11-2. By so limiting its review of the evidence, the panel disregarded, among other things: (i) the annual performance appraisals

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[10]For example, Fox presented evidence that forced rankings of job performance of development representatives nationwide ranked three employees below him (App.11-2); he was *familiar* with four of the products for which other employees had been retained because of their *expertise* (App.11); and, six months after his termination, Uniroyal retained him as an independent consultant on certain projects (App.12). Similarly, Duke presented evidence that in contrast to other sales representatives, he had exceeded his sales objectives while operating within expense limits, doubled the sales of a product assigned to him and brought in two new customers. App.12.

[11]See footnote 2.

for each District 13 development representative which were prepared before the need for the restructuring and reduction was known which unequivocally showed that *all* District 13 development representatives who were retained were rated Excellent performers, while Fox was rated only a Fully Satisfactory performer (Def. Ex. 6, 8, 15, 26, 21 and 4); and (ii) Duke's own witness' testimony that before the need for the restructuring and reduction was known, his peers had ranked him as the *worst* sales representative in District 13 (Trial Tr. 649).

The respondents also presented evidence of adverse employment decisions involving other employees within the protected class in an attempt to establish a pattern of discrimination toward older employees (*i.e.*, Bishop's 1985 termination, Thomas' 1983 termination, Laube's 1985 termination, Barden's 1982 demotion and 1985 retirement, and Tatershall's 1987 demotion). Trial Tr. 12-3, 28, 549, 609-615, 627, 1539. This evidence was admitted, however, without any showing that the number of these instances or the resulting work force demographics deviated from that which would have resulted had the decisions been made by an entirely random process or without any other evidence sufficient to establish a pattern or practice of discrimination. Nevertheless, the panel affirmed the admissibility of this evidence to demonstrate pretext and relied on it, in part, in affirming the jury verdict. App.11; *see also* App.5.

REASONS FOR GRANTING THE PETITION

I. In Conflict With This Court's Precedents And Their Interpretation By Other Lower Courts, The Panel Here Allowed An Employer To Be Found To Have Acted With Discriminatory Intent Notwithstanding Its Failure To Find

Evidence Sufficient To Discredit All Of The Employer's Articulated Legitimate, Nondiscriminatory Reasons For The Adverse Decisions.

In conflict with this Court's precedents and their interpretation by other lower courts, the panel here allowed an employer to be found to have acted with discriminatory intent notwithstanding its failure to find evidence sufficient to discredit all of the employer's articulated legitimate, nondiscriminatory reasons for the adverse decisions.

In doing so, the panel eroded the justification underlying the *McDonnell Douglas* proof scheme. As this Court explained in *Furnco*, the justification for the *McDonnell Douglas* proof scheme stems from the willingness to *presume* that "when all legitimate reasons ... have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration ..." *Furnco*, 438 U.S. at 577. *Burdine* set out two methods by which the plaintiff could satisfy the burden of demonstrating pretext under *McDonnell Douglas*; directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer or indirectly, by showing that the employer's articulated reasons are unworthy of credence. *Burdine*, 450 U.S. at 256. *Furnco* teaches that where the plaintiff chooses to satisfy this burden indirectly, it is not the mere falsity or incorrectness of the employer's articulated reason that gives rise to the conclusion of pretext but rather it is the resulting *absence* of legitimate explanation for the decision that allows an inference of intentional discrimination. *Furnco* precludes permitting an inference of intentional

discrimination unless the plaintiff eliminates *all* of the articulated reasons thereby showing that *no* legitimate explanation for the decision exists.

This Court has never expressly addressed whether a plaintiff who chooses to demonstrate pretext indirectly may do so by simply presenting evidence showing that at least one of the articulated reasons is unworthy of credence or whether he must present evidence discrediting all articulated reasons. Absent explicit guidance from this Court, the lower courts have adopted different approaches.

The first approach, adopted by the First and Sixth Circuits,[12] requires the plaintiff to present evidence discrediting all of the articulated reasons. It interprets

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[12] First Circuit: *Connell v. Bank of Boston*, 924 F.2d 1169, 1177 (1st Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2828 (1991)(ADEA)("[W]e agree with the district court that plaintiff's evidence is not sufficient to permit an inference of age discrimination. Although plaintiff's evidence concerning the municipal accounts may be sufficient to rebut the Bank's assertion that he was dismissed due to his poor performance on those particular accounts, he has not offered any evidence to show that the bank's other reason, his relatively lackluster performance evaluations, was pretextual.").

Sixth Circuit: *Hatcher v. Greater Cleveland Regional Transit Auth.*, 746 F.Supp. 679, 686 (N.D. Ohio 1989), *aff'd*, 911 F.2d 732 (6th Cir. 1990)("Because the RTA has proffered two nondiscriminatory bases for firing him, Hatcher must disprove both of them before the fact-finder may infer discrimination....Hatcher must produce probative evidence disproving both of the RTA's proffered justifications ..."). In an earlier case, the Sixth Circuit held that the falsity of one articulated reason does not mandate a finding that all articulated reasons are pretextual. *Sims v. Cleland*, 813 F.2d 790 (6th Cir. 1987). The Third Circuit in *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988), interpreted *Sims* to allow but not require an inference of discrimination when one articulated reason is rebutted. *Hatcher* apparently dispels this interpretation of Sixth Circuit law.

Furnco and *Burdine* to preclude allowing the plaintiff to present evidence discrediting only some of the articulated reasons and then allowing the falsity or incorrectness of one reason to impeach the credibility of others. This approach permits no inference of discrimination absent evidence discrediting all articulated reasons. Although the Seventh Circuit has not expressly ruled on this issue, it appears to follow the approach which requires the plaintiff to present evidence discrediting all of the employer's articulated reasons. *Cf. La Montague v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410, 1414 (7th Cir. 1984)("The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating *all* lawful motivations ..." (emphasis added)("The Company advanced specific reasons for his discharge, and his rebuttal evidence should be focused on them.")).

The second approach, adopted by the Third and Eleventh Circuits and courts within the Second Circuit and the panel here,[13] relieves the plaintiff of the burden of presenting evidence to discredit all of the employer's articulated reasons. It allows the falsity or incorrectness

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[13] *See, e.g., Roebuck v. Drexel Univ.*, 852 F.2d 715, 734 (3d Cir. 1988)(evidence sufficient to support finding that one basis on which tenure decision was made was pretextual allowed factfinder to infer that other bases for decision were likewise pretextual); *Williams v. City of Montgomery*, 550 F.Supp. 662, 666 n.4 (M.D. Ala. 1982), *aff'd*, 742 F.2d 586 (11th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985)("The court is therefore of the opinion that this third reason was clearly a fabricated afterthought which, if anything, lends support to the conclusion that the other two proffered reasons were pretextual."); *cf. Louis v. Board of Educ.*, 705 F.Supp. 751 (E.D.N.Y. 1989)(implies without holding that inference is permissible stating "Here the unacceptability of defendant's first reason does not raise an inference that defendant's second reason is false.").

of one articulated reason to impeach the credibility of the remaining reasons and, thus, permits an inference of discrimination once the plaintiff presents evidence from which the factfinder could find at least one such reason unworthy of credence.

The panel's affirmance of the jury verdict here based upon evidence held sufficient to discredit Uniroyal's assessment of job performance and product familiarity[14] without any finding whatsoever to discredit its education and research and technical training articulated reasons for determining that the respondents were the least qualified, allowed the respondents to demonstrate pretext indirectly by presenting evidence sufficient to disprove some but not all of Uniroyal's articulated reasons. The panel, therefore, permitted an inference of intentional discrimination based not upon *evidence proving* an absence of legitimate explanation for the decisions, but based only upon an *inference* that if at least one articulated reason for the decision could be found to be unworthy of credence, then all articulated reasons could be found to be unworthy of credence.

This approach erodes the legal principles set out in *McDonnell Douglas*, *Furnco* and *Burdine* by transforming the justification underlying the *McDonnell Douglas* proof scheme from a willingness to infer intentional discrimination from an *absence of legitimate explanation* arising only after *all* legitimate reasons are eliminated as *possible* reasons, to a willingness to infer intentional discrimination based on the *unworthiness of some but not all of the employer's articulated reasons.*

It also, in conflict with this Court's admonishments

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[14]See footnote 2.

in *Burdine* and *Steelworkers v. Weber*, 443 U.S. 193 (1979), seriously diminishes traditional management prerogatives in restructuring the work force. In cases, such as this one, in which the selection of the best qualified employees for increasingly research-oriented and technical duties is at issue during a work force restructuring, the selection process is often multifaceted. Only rarely will a plaintiff not fare better than some colleagues on at least one selection basis. If an employer may be found to have intentionally discriminated against a plaintiff simply because he can present evidence from which reasonable minds could differ as to whether he was in fact the least qualified as to at least one of the selection bases, then litigation-wary employers will forego exercising judgment and discretion in restructuring work forces to best meet the changing nature of their businesses and will resort to non-discretionary measures such as seniority or measures which give preferential treatment to protected class employees--measures which this Court has reversed as contrary to the employment discrimination laws. *Cf. Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 993 (1988)("If quotas and *preferential treatment* become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted...it has been long recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'")(emphasis added).

Moreover, such an erosion of this Court's precedents will encourage the use of federal courts as super-personnel departments simply for reviewing employers' judgments in making employment decisions--a role which this Court has also expressly denounced. *Burdine*, 450 U.S. at 259; *Furnco*, 438 U.S. at 577-8.

As the foregoing summary shows, the lower courts need guidance on this fundamental question of employment discrimination law which this Court has yet to address. Some lower courts following this Court's precedents in *McDonnell Douglas*, *Burdine* and *Furnco* require plaintiffs who choose to demonstrate pretext indirectly to present evidence to discredit all of the employer's articulated reasons for the decision and, thus, prove an absence of legitimate explanation. Others, like the panel here, relieve plaintiffs of this burden and simply require them to discredit some but not all of the reasons thereby allowing the factfinder to *infer* that the remaining reasons are likewise unworthy of credence. These courts do not require that an absence of legitimate explanation be *proven* but instead allow it to be *inferred*. This case is well suited to enable this Court to provide the necessary guidance because the panel's approach here eroded the legal principles underlying *McDonnell Douglas* and diminished management's prerogatives in work force restructuring and reductions.

II. The Conflict Among The Circuits As To Whether To Review All Of The Evidence Or Only The Evidence Favorable To The Non-Moving Party In Determining Whether Evidence Was Presented From Which A Reasonable Jury Could Have Found For The Non-Moving Party Requires Resolution By This Court.

As described above, the circuits are in conflict as to what evidence the court should consider on a motion for directed verdict or judgment notwithstanding the verdict when determining whether evidence was presented from which a reasonable jury could find for the non-moving party. Lacking a uniform rule, they have adopted no fewer than three different approaches.

The first approach, adopted by the Third,[15] Fifth,[16] Ninth,[17] Tenth,[18] Eleventh,[19] and Federal

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[15] *Neville Chem. Co. v. Union Carbide Corp.* 422 F.2d 1205, 1212 n.7 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (adopting the *Boeing* standard which requires the judge to view all the evidence); *accord Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1177-78 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) (court appeared to view all the evidence, stating that "it is the function of . . . the jury . . . to weigh contradictory evidence").

[16] *Boeing Co. v. Shipman*, 411 F.2d 365, 374-77 (5th Cir. 1969) ("[o]n motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which support the non-mover's case ..."); *Fruge v. Penrod Drilling Co.*, 918 F.2d 1163, 1165-66 (5th Cir. 1990) (same).

[17] *Feldman v. Simkins Indus., Inc.*, 679 F.2d 1299, 1303 (9th Cir. 1982) (on motion for directed verdict, the court "must consider all the evidence"); *California Computer Products v. International Business Machines Corp.*, 613 F.2d 727, 733 n.6 (9th Cir. 1979) (the court must consider all evidence, both favorable and unfavorable to the non-movant).

[18] *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634-35 (10th Cir. 1988) (in an ADEA case, the court viewed both sides' evidence on motion for directed verdict); *Brown v. McGraw-Edison Co.*, 736 F.2d 609 (10th Cir. 1984).

[19] *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990) (on motion for summary judgment, "[t]he court must view all evidence most favorably toward the nonmoving party . . ."); *Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304, 1310 (11th Cir. 1990) (on motion for JNOV, "*[a]ll* of the evidence presented at trial must be considered . . .") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 (11th Cir. 1988)); *Wright v. Commercial Union Ins. Co.*, 818 F.2d 832, 834 (11th Cir. 1987) (on motion for directed verdict, "the court must consider all evidence, not just the evidence favoring the nonmovant"); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1368 (11th Cir. 1982) (adopting the *Boeing* standard of considering all the evidence).

Circuits,[20] requires the court to consider all the evidence presented, both favorable and unfavorable to the non-movant. Although the Sixth Circuit has not expressly ruled on this issue, it appears to also follow this approach.[21]

The second approach, adopted by the First,[22] Second,[23] and Seventh[24] Circuits, requires the court to

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[20] *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1454 (Fed. Ct. App. 1984), *cert. denied*, 471 U.S. 1136 (1985) (on motion for directed verdict and motion for JNOV, the court must "consider all the evidence" . . .) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Ct. App. 1983)).

[21] *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (on motion for JNOV in ADEA case, court looked at both sides' evidence); *see also Scharfenberger v. Holmes*, 384 F.Supp. 1269, 1272 (W.D. Ky. 1974), *rev'd*, 542 F.2d 328 (6th Cir. 1976) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (on motion for JNOV, court stated that "the federal standard requires consideration of 'all [of] the evidence -- not just that which support the non-mover's case'")).

[22] *Carlson v. American Safety Equip. Corp.*, 528 F.2d 384, 385 (1st Cir. 1976) ("We examine the facts in the light most favorable to plaintiff, but without neglecting the uncontradicted evidence introduced by defendant.")

[23] *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *Bigelow v. Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974) ("evidence favorable to [the non-movant] may be considered only if that evidence stands uncontradicted and unimpeached"); *Simblest v. Maynard*, 427 F.2d 1, 4-5 (2d Cir. 1970).

[24] *Hampton v. Hanrahan*, 600 F.2d 600, 608 (7th Cir. 1979), *modified*, 446 U.S. 754, *reh'g denied*, 448 U.S. 913 (1980) (by inference, for the court stated that on motion for direct verdict, the court must consider "all the evidence -- disregarding conflicting, unfavorable testimony -- and extract all the reasonable inferences therefrom"). *But see Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 288 (7th Cir.),

consider both favorable and undisputed, unfavorable evidence to the non-movant.

The third approach, adopted by the Eighth Circuit and the panel here, limits the court's review to only the evidence which is favorable to the non-mover. *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), *reh'g denied per curiam*, 728 F.2d 976 (8th Cir. 1984); App.11. This approach apparently grew out of this Court's broad statement in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949)(damages action under the Federal Employees' Liability Act (FELA)), that: "[i]t is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." 336 U.S. at 57.

Wilkerson, however, has been criticized for the breadth of its statement regarding the standard of review for motions for directed verdict and JNOV. *See, e.g. Boeing Co. v. Shipman*, 411 F.2d 365, 381-2 (5th Cir. 1969)(Rives, Jr., concurring in part, dissenting in part); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 949 (1971). The lower courts have almost uniformly held that the *Wilkerson* standard applies only to FELA cases and have declined to follow it in non-FELA cases.

As the foregoing summary shows, the lower courts need guidance on the proper standard for reviewing the

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cert. denied, 396 U.S. 902 (1969) (on motion for directed verdict or motion for JNOV, the court is obliged to 'view all the evidence"); *Pinkowski v. Sherman Hotel*, 313 F.2d 190, 192 (7th Cir. 1963) (on motion for directed verdict, the court "must look to all the evidence in the record").

sufficiency of the evidence. Some require that the court consider all of the evidence. Others require that the court consider both favorable and undisputed unfavorable evidence to the non-movant. Still others, like the panel here, limit the review to only the evidence favorable to the non-movant. Moreover, the intra-circuit confusion on this issue confirms the disarray among the lower courts and the need for this Court's guidance.

The panel's decision here clearly presents the issue to be resolved and is well suited to enable this Court to provide the necessary guidance. By considering only the evidence which it deemed favorable to the respondents, the panel disregarded all other evidence which the jury should have considered in deciding whether Uniroyal's articulated reasons for the respondents' terminations were pretextual--namely, the *undisputed* evidence showing that other employees were in fact better qualified than the respondents such as annual performance appraisals for each District 13 development representative which *unequivocally showed that all District 13 development representatives who were retained were rated as "Excellent" performers, while Fox was rated only a "Satisfactory" performer* and *Duke's own witness' testimony that his peers ranked him as the worst sales representative in District 13* and the comparative educational and research and technical training qualifications, described *infra.* p.11-2.

While it may have been possible for a reasonable jury to find that Uniroyal's determination that the respondents were the least qualified was questionable, upon consideration of only the respondents' censored presentation of the evidence, which was crafted to highlight their strengths and their peers' weaknesses (*i.e.*, the favorable evidence), it is another matter entirely for a

reasonable jury to find that Uniroyal's determination was so unreasonable as to be pretextual upon consideration of the complete record (*i.e.*, the unfavorable evidence). By disregarding all of the evidence unfavorable to the respondents, the panel disregarded the very *undisputed* facts central to Uniroyal's determination that the respondents were the least qualified and to the panel's own determination as to whether evidence was presented from which a reasonable jury could have found that Uniroyal's determination was so unreasonable as to be pretext for discrimination. Had Uniroyal disregarded the complete record and instead considered *only* the facts favorable to the respondents, it too might have determined that they were not the least qualified--but no law required it to do so. To now find it guilty of discriminatory intent based on such a distorted review of the evidence is unfounded.

It should not be the law that the court can go through the record and pick out only the evidence favorable to the non-moving party and then consider only that evidence while totally disregarding all other evidence which the jury should have considered in rendering a verdict. Rather, the law should require the court to consider the entire record as a whole--presumably, as the jury did--and not allow it to single out and consider only the evidence that was favorable to the non-moving party.

III. The Conflict Among The Circuits As To Whether-And In What Circumstances-Evidence Of Adverse Employment Decisions Involving Other Employees In The Protected Class Is Admissible In An Individual Disparate Treatment Case To Show Pretext Requires Resolution By This Court.

As described above, the circuits are in conflict as

to whether evidence of adverse employment decisions involving other employees in the protected class is admissible in an individual disparate treatment case to show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination or any other evidence of a general policy or practice of discrimination.

The first approach, adopted by the Second Circuit and apparently followed in the First and Sixth Circuits, admits evidence of adverse employment decisions involving other employees within the protected class only if it establishes a pattern or practice of discrimination, *i.e.*, the evidence involves enough decisions to raise an inference of discriminatory intent.[25]

Although the Ninth and Eleventh Circuits have not expressly ruled on the *admissibility* of evidence of adverse employment decisions involving other employees within the protected class which does not involve a sufficient number of employment decisions to establish a pattern or practice of discrimination, they too have held that such evidence is not probative of pretext, *Mundy v. Household Fin. Corp.*, 885 F.2d 542, 546 (9th Cir. 1988)(ADEA), and does not provide a basis on which to infer

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[25] *Haskell v. Kaman Corp.*, 743 F.2d 113, 121-2 (2d Cir. 1984)(ADEA)(remanded for new trial because evidence of ten other terminations was insufficient to permit inference of discrimination); *Freeman v. Package Mach. Co.*, 865 F.2d 1331 (1st Cir. 1988)(ADEA)(evidence of nine terminations admissible through expert witness' statistical pattern and practice analysis provided that proper evidentiary foundation was established); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988)(ADEA) (evidence of two other older employees' terminations excluded as irrelevant, in part, because plaintiff "expressly stated that he was not attempting to establish a pattern and practice case.")

discrimination, *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1389 (11th Cir. 1983)(ADEA).

The second approach, adopted by the Eighth, Tenth and Third Circuits and the panel here, admits evidence of adverse employment decisions involving other employees within the protected class even when it does not involve a sufficient number of employment decisions to establish a pattern or practice of discrimination and allows it to be considered together with all other evidence in determining discriminatory intent.[26]

The seemingly irreconcilable decisions in the Fifth and Seventh Circuits likewise confirm the disarray among the lower courts on this issue.[27]

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[26] *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054 (8th Cir. 1988)(ADEA)(affirmed admission of evidence that two oldest employees in 9-person department were terminated stating, "Even where quantitative evidence does not alone demonstrate discrimination to some judicially created standard of statistical conclusiveness, it is still relevant in conjunction with all other evidence in determining intentional discrimination."); *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990)(ADEA)(rejects *Haskell*)(evidence of terminations involving two other employees within the protected class admitted as probative of discriminatory intent).

[27] Fifth Circuit: *Compare Goff v. Continental Oil Co.*, 678 F.2d 593, 597 (5th Cir. 1982)(holding that three other employees' accounts of discrimination were insufficient to establish pattern or practice but reserving comment on probative value that existence of a pattern or practice of discrimination would have on individual disparate treatment claim) *with Harpring v. Continental Oil Co.*, 628 F.2d 406, 409 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981)(individual disparate treatment claim in which court allowed plaintiff to attempt to prove pretext using pattern and practice evidence, expressly acknowledging that evidence of two other employees' terminations would have been relevant to and admissible in pattern and practice showing absent statistical evidence).

As the foregoing summary shows, the lower courts need guidance on what role, if any, evidence of adverse employment decisions involving other employees in the protected class has in an individual disparate treatment case to show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination or any other evidence of a general policy or practice of discrimination. Some exclude such evidence. Others, like the panel here, admit it and allow the factfinder to consider it together with all other evidence in determining discriminatory intent. Moreover, the intra-circuit confusion on this issue confirms the disarray among the lower courts and the need for this Court's guidance.

Under this Court's precedents, no support exists for holding that evidence of employment decisions involving other employees within the protected class is relevant to showing pretext in an individual disparate treatment case absent a sufficient number of decisions to establish a pattern or practice of discrimination or any other evidence of a general policy or practice of discrimination. Notwithstanding its irrelevance, the admission of this evidence requires the employer to either justify each such decision or allow the evidence to stand unrebutted. As the Second Circuit has observed in prohibiting the use of such evidence in demonstrating pretext in an individual

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Seventh Circuit: *Compare Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984)(ADEA)(held that evidence showing that three out of four terminations in a twelve person department involved employees within the protected class was insufficient to give rise to a reasonable inference of discriminatory motive) *with Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 98 (7th Cir. 1985)(ADEA)(relied, in part, on evidence of two former employees' retirement from the company in holding that the plaintiff had presented evidence from which discriminatory intent could be reasonably inferred).

disparate treatment case, the latter option prejudices the employer because not even the strongest jury instructions can dull the impact of a parade of older former employee witnesses who were involuntarily terminated, retired or demoted while the former option requires the employer to "try" all these cases and risk confusion of issues and unfair prejudice. *Haskell*, 743 F.2d at 121-2.

The panel's approval of the admission of evidence of five adverse employment decisions involving other employees within the protected class -- without any evidence whatsoever that the number of these instances or resulting work force demographics deviated from what would have resulted had the decisions been made by an entirely random process or without any other evidence sufficient to establish a pattern of discrimination -- and its reliance on this evidence, in part, in affirming the jury verdict, clearly presents this issue for resolution and, therefore, renders this case well suited to enable this Court to provide the necessary guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-1830

JESSE T. DUKE; SIDNEY W. FOX,

Plaintiffs - Appellees,

versus

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED,

Defendants - Appellants,

and

NORMAN R. BARDEN; JOSEPH R. BISHOP,

Defendants.

No. 89-1834

SIDNEY W. FOX,

Plaintiff - Appellant,

JESSE T. DUKE,

Plaintiff,

versus

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED,

Defendants - Appellees,

and

NORMAN R. BARDEN; JOSEPH R. BISHOP,

Defendants.

No. 90-1750

JESSE T. DUKE; SIDNEY W. FOX,

Plaintiffs - Appellants,

versus

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED,

Defendants - Appellees,

and

NORMAN R. BARDEN; JOSEPH R. BISHOP,

Defendants.

No. 90-1757

JESSE T. DUKE; SIDNEY W. FOX,

Plaintiffs - Appellees,

versus

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED,

Defendants - Appellants,

and

NORMAN R. BARDEN; JOSEPH R. BISHOP,

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CA-87-741-5-CIV)

Argued: December 5, 1990 Decided: April 1, 1991

Before SPROUSE and NIEMEYER, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Sprouse and Judge Michael joined.

ARGUED: James Gunter Billings, Kimberly Jo Korando, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, Raleigh, North Carolina, for Appellants. Lynn Fontana, CRISP, DAVIS, SCHWENTER, PAGE & CURRIN, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Joyce L. Davis, CRISP, DAVIS, SCHWENTER, PAGE & CURRIN, Raleigh, North Carolina, for Appellees.

NIEMEYER, Circuit Judge:

Jesse T. Duke and Sidney W. Fox were discharged from employment with Uniroyal Chemical Company, Inc. on August 15, 1985, as part of a reduction in force. They filed suit, contending that age was a determining factor in the decision to terminate them and that Uniroyal violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988). Following a two and one-half week jury trial, the jury returned a verdict and found in favor of Duke in the amount of $181,115 for loss of back pay and $387,216 for loss of future income, often referred

to as "front pay." The jury also found in favor of Fox in the amount of $18,480 for back pay and $38,055 for front pay. Finally, the jury found that the violations were not willful and no liquidated damages were awarded. *See* 29 U.S.C. § 626(b). Following the verdict, the district judge denied Fox's motion for reinstatement and entered an award of attorneys' fees and costs in the amount of $298,130.81.

Uniroyal charges error in virtually every aspect of trial. The numerous issues that it briefed on appeal may be grouped within the following more generalized contentions: (1) the jury verdict was unsupported by substantial evidence of age discrimination; (2) various rulings of the district court on the evidence were improper; (3) the district court abused its discretion in refusing to sever plaintiffs' claims for trial; (4) the instructions to the jury failed to accommodate adequately the particular facts in evidence; (5) front pay should not have been submitted to the jury; and (6) the district court abused its discretion in its award of attorneys' fees. Fox filed a cross appeal, contending that he was improperly denied reinstatement.

For the reasons that follow, we reject all challenges to the fairness of the jury trial and affirm the verdict of the jury except insofar as it awards front pay. We vacate the awards of front pay and the order denying reinstatement, with instructions to the district court to conduct an equity trial to determine what, if any, equitable relief is appropriate. We affirm the award of attorneys' fees.

I

Duke and Fox were employed with the Crop Protection Division of Uniroyal, Duke as a sales representative of Agri Chemicals in Region 13, and Fox as a sales development representative in Region 13/16. Both were terminated on August 15, 1985, as part of a reduction in force. At the time Duke was 51, having worked with Uniroyal for 16 years, and Fox was 50, having worked for 17 years. At about the same time when Duke and Fox were terminated, Joseph Bishop, 54, was also terminated and Norman R. Barden, 59, elected to take early retirement under a company sponsored program. Although both Bishop and Barden were also plaintiffs in the case below, their claims have since been settled.

Duke, Barden and Bishop were the oldest and longest tenured sales representatives in Region 13, and Fox, who was the only development representative to be terminated, was the oldest and longest tenured development representative in Region 13/16. Six months after Fox was terminated, Uniroyal retained him as an independent consultant, a position that he retained as of trial.

In early 1985, Uniroyal, Inc. was the subject of a hostile takeover attempt that threatened its chemical business. This prompted a leveraged buy out (the LBO) which resulted in the formation of Uniroyal Chemical Company, Inc. The LBO and weakening market conditions caused Uniroyal to restructure and reduce its work force. In selecting those to be terminated, Uniroyal applied employee performance criteria, focusing on the employee's ability to assume greater technical responsibility, demonstrated initiative in increasing sales of small volume products, and past performance ratings.

Uniroyal contends that its particular decision to terminate Duke was based on the fact that Duke's territory was eliminated and his customers were assigned to other territories. He was not reassigned because of his performance against the stated criteria. Similarly, Uniroyal claims that Fox was selected for termination because of his weakness in knowledge of herbicides and pesticides, which Uniroyal had decided to promote, and his inability to promote them.

At trial plaintiffs contended that the articulated reasons given by Uniroyal for their terminations were a pretext for age discrimination. They attempted to prove their case by indirect evidence under the procedure established for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It is unclear whether Uniroyal challenges the sufficiency of plaintiffs' evidence in establishing a prima facie case, but it adamantly contends that no evidence was presented to prove that its articulated reasons were a pretext. It urges that we reverse the district court's denial of its motion for a directed verdict and motion for judgment notwithstanding the verdict.

When determining whether the evidence is sufficient to support the jury's verdict, the evidence must be reviewed in the light most favorable to plaintiffs, giving them the benefit of all inferences. If, with that evidence, a reasonable jury could return a verdict in favor of plaintiffs, the court must defer to the judgment of the jury, even if the court's judgment on the evidence differs. *See Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 594 (4th Cir. 1985).

In the context of the ADEA, a plaintiff must prove, with reasonable probability, that but for the age of the plaintiff, the employment decision adverse to the plaintiff would not have been made. Age must have been a determining factor. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). That burden may be satisfied, as with any other case, by direct or circumstantial evidence.

Under the method of proof by circumstantial evidence established by *McDonnell Douglas*, when the plaintiff proves a prima facie case of age discrimination, the burden of going forward shifts to the defendant. If the defendant articulates a legitimate nondiscriminatory reason for the employment action, the plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action. *Hajoca*, 864 F.2d at 319; *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983).

In *Hajoca* and *Western Electric*, we adapted the elements for establishing a prima facie case to a reduction-in-force case brought under the ADEA and stated that the plaintiff must show:

> (1) [T]hat he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

Hajoca, 864 F.2d at 319 (citing *Western Elec.*, 713 F.2d at 1014-15).

That precise formulation, however, need not be rigidly applied, and differing factual circumstances may require adaptation. The first two elements--that a person was in the protected class and suffered an adverse employment action as a result of the reduction in force--are basic to every ADEA case. The third element, that the employee was performing to his employer's reasonable expectations, however, is an element that may often become irrelevant. When a reduction in force occurs, the terminated employees may well be performing to expectation, and the discharge of a specified group is driven by economic reasons. In selecting those employees who are to be discharged, employers have applied criteria unrelated to performance, such as by seniority or by department or division, or in response to future expected needs of the company, or by combinations of them. When the selection process is based on performance, the criterion is more a question of relevant performance than one of not meeting employer expectations.

The fourth element outlined in *Hajoca*, that persons not protected by the ADEA were retained or that there was evidence that the employer did not treat age neutrally, often proves difficult to apply. A reduction in force decision may result not only in the elimination of personnel, but also in the elimination of positions by the consolidation of functions, departments and territories. Moreover, such restructuring often causes employee transfers, in lieu of terminations. In these multifaceted circumstances, the question of whether a younger employee has been retained can become murky or even irrelevant. The alternative requirement of showing a lack

of age neutrality is a broad criterion that may often be more suited to the method of proof of discrimination by direct evidence.

Under any formulation for establishing a prima facie case, the task of the plaintiff is to prove a set of circumstantial facts which, in the absence of a legitimate non-discriminatory explanation, leads one to conclude with reasonable probability that the adverse employment action was a product of age discrimination. Thus, tailoring the *Hajoca* formulation to this case, where legitimate business reasons led to a reduction of employees in an identified group or territory and the stated criterion for selection was employee performance, we hold that, to prove a prima facie case, the plaintiffs must establish that: (1) they were protected by the ADEA; (2) they were selected from the group or territory for termination; (3) they were performing at a level substantially equivalent to the lowest level of those retained in the group or territory; and (4) the process of selection produced a residual work force of persons in the group or territory containing i) a significantly greater ratio of unprotected persons to protected persons than before the reduction in force was implemented, and ii) some unprotected persons who were performing at substantially the same or a lower level than plaintiffs. Once a prima facie case is established, the employer may articulate a legitimate nondiscriminatory basis of selection, in which case the plaintiff bears the burden of demonstrating that the employer's basis was a mere pretext for discrimination and that age was a determining factor in the selection process.

While Uniroyal's challenge focuses most intensely on whether plaintiffs adequately proved that its articulated reasons were pretextual, it is not clear whether it concedes

a prima facie case was established. However, the evidence supports the conclusion that plaintiffs did establish a prima facie case. Both Duke and Fox were over the age of 40 and protected by the ADEA, and both were involuntarily terminated as sales or development representatives in 1985. Substantial evidence was also offered to show that both Duke and Fox were performing at or better than the lowest level of those retained in the group or territory, although that evidence was disputed. Finally, evidence was offered that those selected for discharge were the oldest in the region and that younger, unprotected persons, who were not performing as well as plaintiffs, were retained or transferred, thus leaving a residual work force with a significantly greater proportion of younger persons. In addition, plaintiffs offered evidence that Uniroyal did not fully follow its own EEO policy of favoring employees with longevity in reductions in force. Uniroyal conceded in its brief that "[a]t best, such a deviation from its policy would allow the 'but for' inference [of age discrimination] to exist as a mere possibility along with others, such as Uniroyal's desire to use an age-neutral selection process to select the best qualified employees." Brief of Appellants at 32. In the aggregate this proof establishes a prima facie case.

Because Uniroyal articulated legitimate nondiscriminatory reasons for its selection of plaintiffs for discharge, *i.e.* that they were the least qualified for the existing and future needs of Uniroyal, the issue moved to the question of whether the plaintiffs offered substantial proof from which a reasonable jury could conclude that the articulated reasons were a pretext for age discrimination.

When focusing on the sufficiency of evidence, taken in a light most favorable to plaintiffs, we act clinically in marshalling the evidence presented in favor of plaintiffs and disregard the substance of evidence offered by Uniroyal. We also must assume that the testimony in favor of plaintiffs was credible, unless totally incredible on its face, and ignore evidence offered to rebut it. In so discharging our duty to review the evidence in the light most favorable to plaintiffs, we conclude that evidence was presented from which a reasonable jury could find that Uniroyal's articulated reasons were pretextual. In addition to showing that Uniroyal discharged the oldest sales representatives in Region 13 and the one oldest development representative in Region 13/16, and that it apparently did not fully follow its own EEO policy in recognizing seniority when making reductions in force, the plaintiffs presented evidence that the merit rankings of Uniroyal employees were possibly artificial or irrational. Evidence was also presented showing that the plaintiffs performed better against stated standards than did other employees ranked higher.

In connection with Fox, the plaintiffs proved that several documents relating to the rankings of employees were developed within the termination period and in some cases were questionable. For example, a memorandum was developed just two weeks before Fox was fired, which described "exciting new chemicals" that purportedly were not within the expertise of Fox but which were to be marketed by Uniroyal. Other evidence, however, tended to show that Fox was familiar with four of the products contained in the memo. Documents which purported to be the rankings of Fox as of October 3, 1983, and September 25, 1984, which concededly were heavily relied on in making the decision to terminate Fox, turned out to be

inaccurate documents prepared for litigation. Uniroyal admitted that they had been copied to remove "extraneous" information. When the trial judge halted the trial to obtain the original documents, the original documents were produced and showed that in fact three other employees were ranked below Fox. All of them were younger than Fox, had less experience, and were retained. Plaintiffs also demonstrated that even though Fox was terminated because he was allegedly a lower performer, he was hired six months later as an independent consultant for Uniroyal, a position he continued to hold at the time of trial.

Duke was purportedly selected for termination because his sales position was eliminated. However, evidence was offered that the document showing the elimination of his territory was accurate for a period of perhaps two weeks, and that after his termination more representatives were servicing his region than before. Moreover, it was shown that by August 16, 1985, the day after he was terminated, Duke had already exceeded his overall 1985 sales goals while operating within expense limits. At the same time, the company's overall performance was lower than planned. Uniroyal representatives also argued that Duke was not sufficiently aggressive, but evidence was offered to show that he in fact doubled the Uniroyal assigned goal for an important product assigned to him and that he had in fact brought in new customers, whereas other sales representatives in the region had brought in none.

The trial was lengthy and the plaintiffs have effectively pointed to other facts to support their position. Considered in the aggregate, the facts presented permit a finding by a reasonable jury that the reasons advanced by

Uniroyal were pretextual. Having reached this conclusion, we cannot disturb the verdict of the jury.

II

Uniroyal challenges several rulings by the district court in admitting evidence. The receipt of one document, in particular, raises a significant question of relevance. Plaintiffs offered, and the court admitted, a one-page Uniroyal newsletter article reporting Uniroyal Chairman Joseph P. Flannery's comments concerning the effects of a leveraged buy out on a company. While Uniroyal had justified, in part, its reduction in force on the restructuring that followed the leveraged buy out. Uniroyal argues that the statements of Flannery in the article were not relevant and were only prejudicial. Uniroyal points particularly to the following excerpts:

> There are, of course, benefits from what has gone on. If you think about world competition a major issue for the U.S. today, the divestment of major units in a leveraged buyout, such as Uniroyal, will surely lead to coupling with similar businesses to make both more competitive in the future. That's good for the business and the employees in those businesses.
>
> On the other hand organizations get ripped apart, staffs eliminated and short-term orientation takes over. Again, each situation is different but this generally happens.
>
> *Shattered Dreams*

> I am bothered by what happens to the average employee. Someone expressed it very well--so many shattered dreams. There are people struggling to survive, to provide for families. I suspect they are not represented here. We do have a responsibility to be concerned about them. Certainly they should not be sacrificed for the benefit of a few, whoever we might be.
>
> The management and employees at Uniroyal who had done the turnaround job should have been allowed to go on. They should have been permitted to share in the gains achieved through their sacrifice and hard work.

J.A. 2220.

While we can appreciate the potentially prejudicial effect that this document might have had in distracting jurors from the issues presented for decision, and can even conclude that the better judgment would have been to sustain Uniroyal's objection, in the context of a two and one-half week trial in which over 175 exhibits were admitted and an accumulation of relevant evidence was presented, we find that any error was harmless.

A review of the other rulings made by the district judge on the admissibility of evidence, while at times presenting close questions, does not demonstrate an abuse of the broad discretion given to trial judges in ruling on the evidence.

III

Uniroyal contends that the district court committed reversible error in denying its motion to sever the plaintiffs' trials. It argues that evidence of discrimination as to one employee would not ordinarily be admissible against another, and therefore to try the two employees together was prejudicial, citing *Weir v. Litton Bionetics, Inc.*, 41 Fair Empl. Prac. Cas. (BNA) 1150 (D. Md. 1986).

Rule 20(a), F.R. Civ. P., provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . . A plaintiff . . . need not be interested in obtaining . . . all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief . . . .

Section (b) of the Rule goes on to provide that the court "may order separate trials or make other orders to prevent delay or prejudice." F.R. Civ. P. 20(b).

Both Duke and Fox were terminated on August 15, 1985, as part of the same reduction in force which was implemented by Uniroyal under a uniform policy adopted for selecting employees for discharge. The reduction was implemented by direction of Uniroyal's national sales manager, Bolton Jones, in consultation with its manager of

employee relations, Bob Douglas. Moreover, the decisions with respect to both Duke and Fox were the product of coordinated efforts in the selection of persons for discharge and in making transfers necessitated by restructuring of regions and departments. Plaintiffs' claims arise out of the same transaction, a single reduction in force, raising common questions of law and fact.

While there was a broad variation of circumstances relating to the merits of the individual performances of each of the plaintiffs, this evidence could be easily distinguished by the jury. The record presents no basis to conclude that the evidence was confusing or that either plaintiff was prejudiced by the evidence submitted by the other.

Moreover, when instructing the jury, the district court was careful to point out that each plaintiff's claim should be considered separately and should rise or fall on the evidence with respect to that plaintiff:

> Where more than one claim is involved, as in this case, you should consider each claim and the evidence pertaining to it separately, as you would, had each claim been tried before you, separately.
>
> * * *
>
> Remember, you are to consider each plaintiff, Mr. Duke and Fox, individually and separately and find and respond to the issues individually.

J.A. 1925, 1929. The court also described the separate claims of each of the plaintiffs to the jury, and the jury

was given a form for returning a verdict which called for a separate finding with respect to each plaintiff.

In these circumstances, we hold that the plaintiffs were properly joined and that the court did not abuse its discretion in denying the motion to sever. *See Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988) (denial of severance motion is an abuse of discretion only if denial deprives defendant of fair trial), *cert. denied*, 489 U.S. 1011 (1989).

IV

Uniroyal contends that the district court did not adequately inform the jury of the law or the manner in which to apply the facts to the law.

Uniroyal is correct in pointing out that we have directed that jury instructions be drawn so as to relate to the particular factual circumstances of the case. Abstract propositions of law stated to the jury without regard to the factual circumstances are potentially confusing. *See United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974). On the other hand, district judges are not required to comment on the evidence, and their refusal to single out any particular item of evidence is often a sensible approach to evenhandedness in the presentation of the law. *See Nelson v. Green Ford*, 788 F.2d 205, 208-09 (4th Cir. 1986).

The district court's instructions to the jury in this case do not offend these applicable principles. The court described the background of the ADEA, the nature of the claims of the parties, and the law to be applied. Contrary to the contention of Uniroyal, the district court did adapt the law to the case. When the district court's instructions are read as a whole, they fairly describe the law that is

applicable to the particular claims of the parties in this case, and they were not presented in such an abstract manner as to confuse.

V

Uniroyal contends that the district court improperly submitted to the jury the issues of whether front pay is to be awarded and the amount, if any, to be awarded. It contends that front pay is an aspect of the equitable relief to be considered by the court and therefore should not be considered by the jury. The plaintiffs, on the other hand, contend that the Seventh Amendment guarantees to them a trial by jury on any issue for recovery of dollar amounts owing, including back pay, liquidated damages and front pay, because such amounts are in the nature of legal remedies.

The circuits are divided on this issue. The Third, Sixth and Ninth Circuits have expressly ruled that the quantification of front pay is a legal question which should be submitted to the jury. *See Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Fite v. First Tennessee Prod. Credit Ass'n*, 861 F.2d 884, 893 (6th Cir. 1988); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). On the other hand, the First, Second, Eighth, and Eleventh Circuits have expressly adopted the position that front pay is an equitable remedy, the amount of which should be left for the court to decide. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985) (district court has discretion to award front pay when reinstatement is impracticable or impossible); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (award of front pay should be made by the

court); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982) (district court may grant, as equitable relief, monetary damages in lieu of reinstatement); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988) (award of front pay is equitable relief; district court has discretion whether to grant it and in what form). The Tenth Circuit has not expressly ruled on the issue but it does appear to support the position that the amount of front pay lies in the district court's discretion. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990) (affirming district court's post-trial award of front pay); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631,637 (10th Cir. 1988) (front pay and reinstatement are alternative remedies for making the plaintiff whole). The Fifth and Seventh Circuits have issued conflicting guidance on the issue of whether the judge or the jury should decide the amount of front pay. *Compare Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.) (jury determines amount of front pay), *cert. denied*, ___ U.S. ___, 110 S.Ct. 129 (1989), *and Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n.4 (7th Cir. 1987) ("authority and reason" suggest that amount of front pay is a jury question), *vacated on other grounds*, 486 U.S. 1020 (1988), *with Deloach v. Delchamps, Inc.*, 897 F.2d 815, 824 (5th Cir. 1990) (front pay is equitable remedy and amount is within district court's discretion), *and Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989) ("we need not address the difficult question"). The Fourth Circuit has not addressed the issue.

The ADEA was enacted in 1967 to promote the employment of older persons based on their ability rather than their age and prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621(b). Remedies for violation

of the Act are provided in Section 626(b) which provides in part:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

(Emphasis added.) Although front pay is not expressly enumerated, the Act permits a range of equitable and legal remedies to give effect to its purposes. The right to trial by jury is preserved on legal issues. 29 U.S.C. § 626(c)(2). When both legal and equitable remedies are demanded, the appropriate method of proceeding requires submission of the case first to the jury to resolve liability and all legal damages. Thereafter, the court conducts a trial in equity to resolve all issues of equitable relief. *See Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970) ("[W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed . . . ."); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) ("[O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.").

In this case Duke and Fox have requested both legal and equitable remedies, including, among other things, reinstatement, compensation for loss of back pay and benefits, loss of future pay and benefits until

retirement, and liquidated damages for willful violations. The district court, determining that front pay was a legal issue, submitted the question of whether it is to be awarded and in what amount to the jury. In addition to awarding Duke and Fox back pay, the jury made separate awards of front pay for anticipated lost income and benefits from the date of the trial until retirement.

Future wages are often determined with reasonable certainty and awarded as legal damages in circumstances where the earning capacity of a plaintiff is destroyed or damaged. In circumstances, however, where employment is terminated without destroying the capacity to work, the nature and extent of injury is nearly indeterminable. The broad array of potential circumstances of a terminated employee's future income makes any attempt at finding damages a speculative venture. The question of whether the discharged employee will ever work again despite his best efforts or will obtain gainful employment in two years, or immediately, is not something that is within the realm of fact finding. To have a jury thus compute a number without regard to reasonably certain predictions of actual injury is foreign to established principles of legal damages.

The appropriate method for addressing the difficult question of providing a remedy which anticipates potential future losses requires an analysis of all the circumstances existing at the time of trial for the purpose of tailoring a blend of remedies that is most likely to make the plaintiff whole. The beginning point under the ADEA for preventing future loss is reinstatement. *See*, *e.g.*, *Maxfield*, 766 F.2d at 796.

While an employer-employee relationship may not be fully restored to its pre-violation condition by

reinstatement, the chances of a proper restoration are greater than by guessing, with an award of front pay, whether and for how long a plaintiff will work in the future. Under one scenario of future events, the plaintiff could be left without a remedy and under another the plaintiff could end up with a windfall. In either case, an injustice is done to one party or the other.

It is axiomatic, however, that notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate. For example, reinstatement has not been ordered when the employer has demonstrated "such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985). Reinstatement has also been found inappropriate when the litigation itself created such animosity between the parties that any potential employer-employee relationship was irreparably damaged; or when the company was no longer in business; or when the particular business for which the plaintiff was qualified was no longer operating; or when there was no comparable position available. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). Also, when the period for reinstatement was expected to be a relatively short one, such as if the plaintiff was close to retirement, the strong preference in favor of reinstatement has been found to be neutralized by the increased certainty of the potential loss of pay, permitting consideration of a front pay award. *See, e.g., McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Combinations of the factual circumstances noted could lead to awards for temporary periods of front pay, such as a time for

retraining the employee if that course is the one more suited to making him or her whole.

When reinstatement is not appropriate, then other remedies may be considered. We join virtually all circuits that have considered the subject in concluding that front pay is an available remedy to complete the panoply of remedies available to avoid the potential of future loss. *E.g.*, *Wildman*, 771 F.2d at 616 (1st Cir.); *Whittlesey*, 742 F.2d at 728 (2d Cir.); *Maxfield*, 766 F.2d at 796 (3d Cir.); *Hansard*, 865 F.2d at 1469 (5th Cir.); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *McNeil*, 800 F.2d at 118 (7th Cir.); *Gibson*, 695 F.2d at 1100 (8th Cir.); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *EEOC v. Prudential Fed.*, 763 F.2d at 1172-73 (10th Cir.); *Goldstein v. Manhattan Indus. Inc.*, 758 F.2d 1435, 1448-49 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); *cf. Taylor v. Home Ins. Co.*, 777 F.2d 849, 860 (4th Cir. 1985) (affirming district court award that included front pay), *cert. denied*, 476 U.S. 1142 (1986).

The question of who should determine the amount of front pay to be awarded--the jury or the trial judge--rests on whether front pay is a legal or equitable remedy. Traditionally, money damages were a "form of relief offered in the courts of law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974). Money damages, however, are not always legal in nature; a money damages award may be a form of equitable relief if it is "restitutionary" or "incidental to or intertwined with injunctive relief." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, __ U.S. ____, 110 S.Ct. 1339, 1348 (1990) (citations omitted). For example, in cases brought under Title VII

of the Civil Rights Act of 1964, back pay has been characterized by the courts of appeal as "an integral part of an equitable remedy, a form of restitution." *Curtis*, 415 U.S. at 197. The characterization is based "on the fact that the decision of whether to award backpay is committed to the discretion of the trial judge." *Id.* In addition, there is a sense that back pay is the method by which the defendant is required to "disgorge funds wrongfully withheld from the plaintiff." *Id.*

Similarly, whether front pay is to be made available to a plaintiff under the ADEA is a matter left to the discretion of the trial judge who must consider a host of factors, including whether reinstatement is practical. While reinstatement, which is clearly an equitable remedy, is the much preferred remedy, front pay may serve as a substitute or a complement. Because of the potential for windfall, however, its use must be tempered. It can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. If a plaintiff is close to retirement, front pay may be the only practical approach. The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages. Its award, as an adjunct or an alternative to reinstatement, must rest in the discretion of the court in shaping the appropriate remedy. Thus, as with back pay under Title VII, front pay under the ADEA has a restitutionary nature. We conclude therefore that its award and amount is one for the court sitting in equity to consider and not the jury.

In submitting that issue to the jury in this case, the district court permitted awards which did not take into

account the discretion, restraint and balance that a court of equity could bring to bear in considering the variations of application. Accordingly, we vacate that part of the jury verdict which is attributable to front pay with the instructions that the district court conduct an equitable hearing to determine, in accordance with the principles outlined in this opinion, whether front pay should be awarded and if so in what amount.

Fox contends also that the court improperly denied him reinstatement and refused to afford him a hearing for purposes of determining whether reinstatement was appropriate. Because we are directing that an equitable hearing take place and reinstatement is the much preferred remedy for addressing potential future losses which should be considered in tandem with other potential equitable remedies as described herein, our remand order includes the order for the court to reconsider the total equitable remedies available to Fox, including the possibilities of reinstatement, front pay, a combination, or, if appropriate, no remedy.

In remanding this case for an equity trial to determine the appropriate equitable relief, if any, we do not disturb the jury verdict except insofar as we vacate its awards of front pay, which were separately stated.

VI

In their petition for attorneys' fees and costs, Duke and Fox originally claimed fees incurred for the conduct of the trial in the amount of $531,465.70 and costs of $24,700.98. They later submitted claims for additional fees incurred in prosecuting the fee petition in the amount of $75,235 and costs of $3,193.68. The fees sought included a contingency enhancement. After reviewing the

voluminous submissions by the parties and conducting a hearing, the district court awarded plaintiffs $240,960.25 in attorneys' fees, plus $21,447.88 in costs, incurred in connection with the trial and $34,050 in fees, plus $1,672.68 in costs, incurred in prosecuting the fee petition.

Uniroyal contends that the award was improperly determined by the district court because the descriptions of time entries supplied by plaintiffs were too generalized, and the court used a method of reducing fees across the board without a sufficiently detailed analysis.

In its opinion in support of its award of attorneys' fees, the district court concluded that it had been presented with "adequate documentation" of the time incurred by counsel for the plaintiffs. It noted that counsel for Uniroyal "have represented to the court that they do not contest the reasonableness of the total number of hours that plaintiffs' attorneys spent on the case." J.A. 812. The parties focused on whether the time incurred with respect to claims which were dismissed by summary judgment and settled before trial should cause a reduction and whether the hourly rates of plaintiffs should be enhanced. Addressing these issues, the court stated:

> [A]fter a review of the timesheets the court finds that a 25% reduction in Stage I [the period from the beginning of the litigation through its summary judgment phase] adequately estimates the time spent on non-prevailing plaintiffs and on the wrongful-discharge claims of the prevailing plaintiffs.
>
> The court finds that a 25% reduction in Stage III [the post-trial motions phase]

> time is necessary to account for the unsuccessful, post-trial reinstatement/additur motion of Fox and the unsuccessful motions for reconsideration of Bishop and Barden. Time spent on these motions was not related to the success of Fox and Duke in their ADEA claims and is not compensable.

J.A. 814. The district court noted that even though only two of the four plaintiffs were prevailing parties, a direct prorated reduction of 50% would not be appropriate because "it would not be accurate to say that the plaintiffs could have prosecuted the claims of Duke and Fox with only half the labor that they expended in prosecuting the claims of Duke, Fox, Bishop, and Barden." *Id.* The analysis of the district court was well-reasoned and was based not only on its review of the vast volume of data submitted by counsel but also on its own intimate familiarity with the case and on the concessions made by counsel during the attorneys' fee petition phase. The district court was not clearly erroneous in its findings.

The district court also adjusted downward the hourly rates of counsel for the plaintiffs to bring them in line with the relevant market rates in the community. It refused to enhance further the attorneys' fees claim of plaintiffs on grounds of exceptional success and refused a further downward reduction urged by Uniroyal on the basis that documentation was inadequate and that success was not total. The court's analysis on these issues was thorough and thoughtful, and we find no abuse of discretion. Accordingly, the award of attorneys' fees is affirmed.

VII

In summary, we reject all challenges to the jury phase of trial and affirm the verdict of the jury except insofar as the jury awarded front pay. We affirm the award of attorneys' fees. We vacate the awards of front pay and the district court's order denying Fox reinstatement and remand the case to the district court to conduct an equity trial to determine the appropriate equitable remedies, if any, for all parties in accordance with the principles set forth in this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

APPENDIX B

Filed: June 3, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-1830 (L)
(CA-87-741-5-CIV)

Jesse T. Duke, et al,

Plaintiffs - Appellees,

versus

Uniroyal Incorporated, et al,

Defendants - Appellants.

ORDER

The Court amends its opinion filed April 1, 1991, as follows:

On page 10, first paragraph, line 4 -- section (4), to the end of the sentence, is deleted, and is replaced with the following:

> (4) the process of selection produced a residual work force of persons in the group or territory containing some unprotected persons who were performing at a level lower than that at which the plaintiffs were performing.

On page 11, first paragraph, line 2 -- the phrase "thus leaving a residual work force with a significantly

greater proportion of younger persons" is deleted; the sentence ends with the word "transferred."

For the Court - By Direction

/s/ John M. Greacen

CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 31, 1991

No. 89-1830

JESSE T. DUKE; SIDNEY W. FOX

Plaintiffs - Appellees

v.

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED

Defendants - Appellants

and

NORMAN R. BARDEN; JOSEPH R. BISHOP

Defendants

No. 89-1834

SIDNEY W. FOX

Plaintiff - Appellant

JESSE T. DUKE

Plaintiff

v.

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED

Defendants - Appellees

and

NORMAN R. BARDEN; JOSEPH R. BISHOP

Defendants

No. 90-1750

JESSE T. DUKE; SIDNEY W. FOX

Plaintiffs - Appellants

v.

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED

Defendants - Appellees

and

NORMAN R. BARDEN; JOSEPH R. BISHOP

Defendants

No. 90-1757

JESSE T. DUKE; SIDNEY W. FOX

Plaintiffs - Appellees

v.

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED

Defendants - Appellants

and

NORMAN R. BARDEN; JOSEPH R. BISHOP

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The defendant-appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Sprouse and Judge Michael, district court judge sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK

(2)

No. 91-441

Supreme Court, U.S.
FILED
OCT 16 1991
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1991

UNIROYAL, INC. and UNIROYAL CHEMICAL CO., INC.

Petitioners,

v.

JESSE T. DUKE and SIDNEY W. FOX,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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No. 91-441

In The

Supreme Court of the United States

October Term, 1991

UNIROYAL, INC. and UNIROYAL CHEMICAL CO., INC.

Petitioners,

v.

JESSE T. DUKE and SIDNEY W. FOX,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit opinion in this case.

STATEMENT OF THE CASE

Respondents Jesse T. Duke and Sidney W. Fox were discharged from employment with Uniroyal Chemical Company, Inc., on August 15, 1985, as part of a reduction in force. Duke was an agrichemical sales representative in sales region 13, and Fox was a sales development representative in region 13/16. At the time Duke was 51, having worked with Uniroyal for 16 years, and Fox was 50, having worked for 17 years. During the same time period when Duke and Fox were terminated, Joseph Bishop, 54, was also terminated and Norman R. Barden, 59, elected to take early retirement. Bishop and Barden were also plaintiffs in the case below, but their claims were settled.

Duke, Barden, and Bishop were the oldest and longest tenured sales representatives in region 13. Fox, who was the only development representative to be terminated, was the oldest and longest tenured development representative in region 13/16. While Fox and Duke were fired, younger employees were either retained within their positions or were transferred. (J.A. 1011, 2306).[1] Common decisionmakers were involved in the terminations and transfers. (J.A. 1631, 1653-54, 1708; T.T. 1314-15, 1320).

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[1] References to J.A. are to the Joint Appendix to the Court of Appeals. References to T.T. are to the Trial Transcript. References to App. are to the Appendix to this Brief. References to Pet. are to Uniroyal's Petition.

Uniroyal contended that two conditions occurring simultaneously caused the 1985 terminations: (1) poor sales performance against the sales goal in two products, Dyanap and RMH 30, and (2) leveraged buyout (LBO) cost-cutting requirements to cover increased debt. (T.T. 798, 1226-27; J.A. 1439). Uniroyal claimed that a de-emphasis in Dyanap and RMH 30 was one of the reasons for Duke's termination. (J.A.1613; T.T. 1288-90, 1297-99). At trial, Uniroyal's development manager first testified that this alleged product de-emphasis had no impact on his decision to fire Fox. (J.A. 1530-31). Later, however, he stated that a downturn in Dyanap and RMH 30 was a factor in Fox's termination. (T.T. 1178-79). Pretext could be inferred from this inconsistency, as well as from evidence that Uniroyal distorted its figures, that Uniroyal's own predictions reflected little decrease in forecast sales of these products, that other Uniroyal products fell farther from their 1985 sales goals than Dyanap and RMH 30, and that the termination of employees was not Uniroyal's past response to product swings. (J.A. 1639, 1663, 1671-77, 1684-89, 2288, 2312, 2329, 2358-60, 2363; T.T. 1275-78; Pl.Exh. 59).

Uniroyal also relied on "forced rankings" as a reason for terminating Fox, introducing Defendant's Exhibit 3, which was a purported forced ranking dated September 25, 1984, with Fox ranked last. (T.T. 912). On cross-examination, the Uniroyal development manager admitted that there were two copies of this document, the original and

one that he had recopied to remove "extraneous" information. (T.T. 913). The trial was stopped while documents were telefaxed from Uniroyal headquarters. The newly-produced original September 1984 ranking showed Foland (age 42 with three years of Uniroyal service) ranked below Fox. Foland, like Fox, had no Ph.D. Newly-produced rankings for April 1984 showed Connell (age 38 with four years of Uniroyal service), Foland, and Farlow (age 32 with one year of Uniroyal service) ranked below Fox. As the Fourth Circuit correctly noted, "the original documents showed that in fact three other employees ranked below Fox. All of them were younger than Fox, had less experience, and were retained." (App. 12).

Uniroyal also claimed that Fox was terminated because new products were not impacting his territory as much as others. (J.A. 1475; T.T. 906, 1091, 1095). This claim was refuted by Uniroyal's own memo dated two weeks before Fox was discharged which listed new products impacting Fox's region. In contrast to the few new products on which retained, younger development representatives had worked, Uniroyal's development manager admitted that Fox had previously worked or would be working with 5 of the 9 new products listed by Uniroyal as impacting region 13/16 and all 5 of the key focus products listed by Uniroyal. (J.A. 2195, 1600-1604). Fox confirmed that he had previously worked with or would be working with 8 of the 9 new products. (J.A. 1072-78). Fox had successful experience

working with two of the four major development projects identified in Uniroyal's December 1984 national business review. He had 17 years of successful experience researching and introducing new products, had worked with all four categories of Uniroyal products (insecticides, which involves entomology; herbicides, which involves "weed science;" plant growth regulators; and fungicides), and had worked successfully on the application of Uniroyal products on 13 different crops. (J.A. 1046-49, 1592-95, 1598-99, 2195, 1600-1604, 2090, 2350).

Uniroyal incorrectly states that "the panel did not require any showing whatsoever that the education and research and technical training reasons were pretextual. . . . " (Pet. 3). Uniroyal's argument that Fox was terminated because he lacked a Ph.D. was refuted by evidence that the younger Foland, who was ranked lower than Fox but was retained, also did not have a Ph.D. Uniroyal argues that Fox was weaker in weed science, entomology, research, and technical skills. Other employees, however, were ranked lower, and Fox had years of successful weed science and entomology experience introducing new products including the herbicides Dyanap, Alanap, Fallar, Casoron, and Rescue, and the insecticides Dimilin, Comite, and Omite. (J.A. 1046-49, 1569-70, 1592-95). Further, even though Fox was terminated because he was allegedly a lower performer, he was hired six months later as an "independent consultant" for

Uniroyal, a position he held until September 5, 1991.[2] (J.A. 1028).

Uniroyal cites the published treatises of two of its development representatives, but fails to state that Farlow, for example, had not published since he began working with Uniroyal nor was he hired to make scientific publications. (J.A. 1576-77).

In summary, Fox presented evidence that similarly situated development representatives were treated more favorably than Fox by retention or transfer despite being younger, having less service, being lower ranked, working with fewer new products, being inexperienced and needing to develop the contacts necessary to perform their jobs. (Respondents' Court of Appeals Brief at 9-13).

One of Uniroyal's reasons for terminating Duke, in addition to the alleged downturn of Dyanap and RMH-30, was that his sales position was eliminated. This reason was shown to be pretextual by evidence that the map showing the elimination of his territory was accurate for a period of perhaps two weeks, and that after his termination more representatives were servicing his region than before. (J.A. 1613-15; 1653-62, 2369; T.T. 1262-67, 1288-90, 1297-99).

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[2] See Conclusion at pp. 21-22. The district court subsequently ordered Uniroyal to continue its consulting employment relationship with Fox.

Uniroyal also argued that Duke was terminated because he was a lower performer. The sales manager admitted, however, that the two primary responsibilities of a salesman are (1) to achieve his sales goals and (2) to operate within expense limits. (J.A. 1669). The evidence showed that by August 16, 1985, the day after he was terminated, Duke had already exceeded his overall 1985 sales goals while operating within expense limits. At the same time, Duke's region did not meet its sales goals, therefore other, younger employees were not as successful as Duke. (J.A. 1208-26, 2102, 2184-94, 2365-66; T.T. 1273-74).

Uniroyal also argued that Duke was less aggressive and less able to develop new customers. (T.T. 1297). Duke, however, presented evidence that he had doubled his sales goal on an important product assigned to him, and that he had brought in new customers, whereas other sales representatives in the region had brought in none. (J.A. 1247-48; T.T. 1439).

At the time Duke was discharged, he was told that a transfer to Florida, which had previously been discussed, was not an option because Uniroyal had not received an EPA label on the product Dimilin. This statement to Duke was false. While it was true that the Dimilin label had not been issued, that fact did not prohibit Uniroyal from transferring a younger and less-tenured employee from development into the Florida sales position. (J.A. 1648-50, 1205-07,2180).

Uniroyal also argued that an analysis of the product mix of employees led to the decision to terminate Duke. However, Duke's product mix was no different from that of Foster and Porter, also in Region 13, neither one of whom were fired. (J.A. 1226, 1697-98, 2180).

Finally, Uniroyal misstates the facts in arguing that all retained sales representatives in Duke's region had superior educational qualifications. (Pet. 12). Foster, like Duke, only possessed a high school diploma. (T.T. 1300). Further, Duke's alleged educational, research, and technical deficiencies were not among the list of reasons he was given for his termination at the time he was discharged, and they were not presented as such at trial. (J.A. 2180; T.T. 1288-1300).

In addition to the above evidence of pretext, respondents presented evidence that Uniroyal did not follow its own reduction in force and transfer policies in implementing the RIF. (J.A. 2294-2300, 1450, 1537-39, 1553, 1735-36, 1756; Pl. Exh. 258).

Following the two and one-half week trial and ten hours of deliberation, the jury returned separate verdicts in favor of Duke and Fox. Uniroyal listed 11 issues on appeal, charging error in virtually every aspect of trial. The Fourth Circuit rejected all challenges to the fairness of the jury trial and affirmed the verdict except insofar as it awarded front pay. The awards of front pay and the denial of reinstatement were vacated, with instructions to the district court to

conduct an equity trial to determine what, if any, equitable relief is appropriate.

Uniroyal then filed a Petition for Rehearing With Suggestion for Rehearing In Banc. There being no request for a poll, the petition was denied on May 31, 1991.

REASONS FOR DENYING THE WRIT

The age discrimination case actually presented to this Court is markedly different from the one described by Petitioner, and it is factually much more complex. Uniroyal offered numerous, sometimes inconsistent reasons to justify choosing Duke and Fox for termination. Most of these reasons, all of which were shown to be pretexts for age discrimination, are omitted from Uniroyal's statement of the case or they are misrepresented in Uniroyal's Petition. Finally, the questions Uniroyal presents to this Court are not well represented by the record in this case or the Fourth Circuit decision, if at all.

I. Neither the decision below nor the record raises the question of whether discriminatory intent can be shown without a finding that all of the employer's articulated reasons are pretexts.

After finding that each Respondent established a prima facie case, the Fourth Circuit summarized the evidence of pretext and specifically held that "the facts presented permit a finding by a reasonable jury that the reasons advanced by Uniroyal were pretextual." (App. 13 (emphasis

added)). This decision can not fairly be construed to hold, as Uniroyal contends, that a plaintiff can prevail without showing that all of the employer's articulated reasons are pretextual.[3]

Nowhere in the opinion does the Fourth Circuit state or imply that respondents failed to discredit all of Uniroyal's reasons for the terminations. The question which Petitioner attempts to raise cannot be extracted from the decision below.

Further, the facts of record do not permit the formulation or the resolution of the question presented. Contrary to the position taken by Uniroyal, Respondents did present evidence challenging all of Uniroyal's proffered reasons, including its education, research and technical training reasons.[4] This evidence is summarized in this Brief at pp. 2-8 and 14-16, and it was discussed in voluminous

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[3] Contrary to Uniroyal's contention, the court below properly understood the McDonnell Douglas scheme of proof, stating that "the [ultimate] task of the plaintiff is to prove a set of circumstantial facts which, in the absence of a legitimate non-discriminatory explanation, leads one to conclude with reasonable probability that the adverse employment action was a product of age discrimination." (App. 9 (emphasis added)).

[4] Uniroyal ignores the bulk of the evidence of pretext each respondent presented as well as issues of witness credibility. (Pet. 17). More specifically, Uniroyal's credibility was destroyed at trial when original documents were produced showing other employees ranked below Fox.

detail in 70-page opening and answering briefs presented to the Fourth Circuit by each party.

Contrary to Uniroyal's implicit suggestion, a plaintiff is not required to come forward with a specific type of evidence to contradict a proffered reason.[5] Plaintiffs must be given the opportunity to counter the employer's articulated reasons with evidence that the reason given is "pretextual" or "not the true reason." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct 1089, 1095, 67 L.Ed.2d 207 (1980). This evidence may take the form of new evidence designed directly to attack the credibility of the defendant's specific explanation or simply to prove that, as against that specific reason, age is the "more likely" explanation. Id. Justice Kennedy, delivering the opinion of this Court, recently reiterated that a discrimination plaintiff "is not limited to presenting evidence of a certain type . . . . She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." Patterson v. McLean Credit Union, 491 U.S. 164, 188, 109 S.Ct. 2363, 2378-79, 105 L.Ed.2d 132, 138 (1989).

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[5] For example, a plaintiff can attack the credibility of the employer's proffered reasons (1) by showing that they have no basis in fact, or (2) if they have a basis in fact, by showing that they were not really the motivating factors, or (3) if they are factors, by showing they were jointly insufficient to motivate the discharge. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1414-15, 1415 n.6 (7th Cir. 1984).

II. The decision of the panel, when read in its entirety, reflects that the Fourth Circuit followed its prior holdings and reviewed all of the evidence.

Uniroyal's argument that the Fourth Circuit did not review all of the evidence is based on two sentences of the 29-page decision, taken out of context. A reading of the decision in its entirety shows that the court applied the traditional Fourth Circuit standard of review which views all of the evidence. This standard is the long-standing, traditional standard applied by the majority of courts.[6]

In the decision below, the Fourth Circuit stated:

> When determining whether the evidence is sufficient to support the jury's verdict, the evidence must be reviewed in the light most favorable to plaintiffs, giving them the benefit of all inferences. If, with that evidence, a reasonable jury could return a verdict in favor of plaintiffs, the court must defer to the judgment of the jury, even if the court's judgment on the evidence differs. See,

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[6] Uniroyal concedes that the Fourth Circuit standard reviews "all the evidence, both favorable and unfavorable to the non-moving party." (Pet. 7). If the Fourth Circuit had modified a long-standing standard of review, as Uniroyal contends, the opinion would have expressly stated so. The conclusion that the opinion applied the traditional standard of review is buttressed by the fact that Uniroyal failed to persuade even one Fourth Circuit judge to address this contention in its Petition for Rehearing with Suggestion for Rehearing In Banc.

> Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988), cert. denied, 490 U.S. 1107 (1989); Gill v. Rollins Protective Services, 773 F.2d 592, 594 (4th Cir. 1985).

(App. 6).

The decision's specific references to Hajoca and Gill are instructive. In Gill, the Fourth Circuit stated that:

> In ruling on [a] motion [for JNOV] the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion.

773 F.2d at 594 (emphasis added)(citing Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980)(citing Mays v. Pioneer Lumber Corp., 502 F.2d 106 (4th Cir. 1974)).

Similarly, in Hajoca, the Fourth Circuit stated that:

> In reviewing a grant or denial of a motion for a JNOV or directed verdict, the appellate court is to apply the same standard that governed the trial court's determination . . . . whether, viewing the evidence in the light most favorable to the non-moving party and giving him the benefit of all reasonable inferences, there is sufficient evidence in the record to support a jury verdict in his favor (citations omitted). The court must not weigh

> the evidence or assess the credibility of witnesses. (citation omitted).

864 F.2d at 319 (emphasis added).

In stating that "we . . . disregard the substance of evidence offered by Uniroyal," the Fourth Circuit properly refused to weigh the evidence as the jury would or assess the credibility of witnesses. (App. 11 (emphasis added)). The fallacy in Uniroyal's argument is that it construes the court's refusal to weigh the evidence as a failure to consider all the evidence. Clearly the court considered all the evidence, including Uniroyal's articulated reasons for discharging the plaintiffs. The Fourth Circuit fairly summarized these reasons in its decision. (App. 5-6, 10-13). The panel properly concluded that "[c]onsidered in the aggregate, the facts presented permit a finding by a reasonable jury that the reasons advanced by Uniroyal were pretextual. Having reached this conclusion, we cannot disturb the verdict of the jury." (App. 13 (emphasis added)).

Yet Uniroyal attempts to persuade this Court that a different result would be obtained if the Fourth Circuit had considered "undisputed" evidence. (Pet. 23). Uniroyal incorrectly states that all District 13 Development Representatives who remained after the RIF were excellent performers. (Pet. 13, 23). One of the candidates for termination, Nester (age 33), was not even working as a development representative until three months before the RIF, when he was transferred 200 miles into region 13/16 .

(J.A. 1566-67, 2096, 2263). In the spring of 1985, Nester had no evaluation as a development representative. His May 1985 evaluation noted his deficiencies, stating he would have to learn the responsibilities of his new position. (J.A. 1567, 2272). His 1985 evaluation, which rated him excellent, was for his work as a research chemist. (J.A. 2270-2273). His 1985-86 evaluation as a development representative rated him fully satisfactory, like Fox. Another candidate for termination, Rogerson (age 45) was evaluated as unsatisfactory and was on probation in his then position of sales manager in region 13. (J.A. 1563-65, 1672-74, 2301-03). He was transferred into development during the RIF.

Uniroyal also represents that one of Duke's witnesses testified that Duke's peers had ranked him as the worst sales representative in District 13. (Pet. 13, 23). This statement is misleading since Uniroyal fails to state that this "peer ranking" was from 1983"[7] (T.T. 647). This witness also testified that he had ranked Duke as one of the two highest salesmen in the region. (J.A. 1317). He also testified that for several years Duke was ranked number one in the entire country. (J.A. 1314). The objective evidence showed, contrary to Uniroyal's contention that Duke was a lower performer, that in 1985 Duke performed better against

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[7] Uniroyal admits that the ranking was from 1983. Appellant's Fourth Circuit Brief at 17.

Uniroyal-stated sales standards than the younger employees who were retained.[8]

Finally, even assuming that there is a conflict among the circuits on the issue of the standard of review of a JNOV, this conflict is a long-standing one to which this case is not easily applied. This case is factually complex and disputed. Further, the Fourth Circuit applied the traditional, majority standard of review, and decided the case fairly and correctly.

III. Neither the decision below nor the record raises the question of whether adverse employment decisions involving other employees is admissible in an individual disparate treatment action "to show pretext absent a sufficient number of these decisions to establish a pattern or practice of discrimination or any other evidence of a general policy or practice of discrimination." There is no conflict in the circuits on this alleged question.

Contrary to Uniroyal's assertion, the Fourth Circuit decision below, on its face, does not state or otherwise discuss the issue which Uniroyal presents.

Further, the record does not support Uniroyal's factual contentions. Uniroyal incorrectly implies that

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[8] He achieved his sales goals while remaining within his expense limits, p. 7, supra.

"anecdotal evidence" of age discrimination against six other older employees was admitted at trial. (Pet. 2, 13).

The record reflects only that the jury was allowed to compare the ages of employees terminated to those retained or transferred.[9] Uniroyal introduced Defendant's Exhibit 1, a listing of development representatives by age, and Exhibit 110, a listing of involuntary terminations by age of employees in the sales division between 1982 and 1987. Further, Uniroyal's counsel made statements in its opening statement and closing argument and elicited testimony from almost every witness on direct and cross examination relating to employees older than Duke and Fox who were retained (e.g., J.A. 988-89, 991-92, 1901-02, 1905-06; T.T. 299-300, 307-11, 387-92, 519-20, 638-46, 1453-54).[10] Other older employees who had been terminated were not allowed to testify that their terminations were because of age. Thus there was no "anecdotal" evidence of age discrimination against other employees presented at trial.

The reference to Thomas's 1983 termination is illustrative. (Pet. 13). Thomas's termination was mentioned by Respondent Duke once during the two and one half week

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[9] This was not a disparate impact case, nor was it one in which a statistician testified as to inferences which could be drawn. The jury had before it the entire roster of Uniroyal sales and development employees and their ages.

[10] Thus, Uniroyal has waived any Fed. R. Evid. 403 objections to the admissibility of this evidence.

trial, but Duke did not state or insinuate that Thomas was terminated because of his age. (T.T. 1196). Thomas was subsequently called as a witness to testify to Duke's performance but he did not testify that he was fired. J.A. 1281-88. Prior to Thomas's testimony, Uniroyal's counsel became concerned that Thomas would testify about his termination. When reminded by plaintiffs' counsel that Duke had already stated that Thomas was terminated, Duke's statement had been so innocuous that Uniroyal's counsel did not remember it. (J.A. 1278-79).

Similarly, Bishop, the other sales representative who was terminated in the RIF, testified to Duke's and Fox's job performance. He was not allowed to state his belief that he was fired because of his age, nor was he allowed to compare his performance to others. Bishop's performance evaluations were not admitted. (J.A. 1343-44).

Similarly, Barden, who retired during the same time period as the Duke, Bishop and Fox terminations, was not allowed to testify that he was asked to or forced to retire because of his age. (J.A. 1775-79). Barden was the former region 13 sales manager until he was demoted in 1982. (J.A. 1780). He testified in rebuttal about Duke's and Fox's performance, and Uniroyal even questioned him about personnel evaluations he made while regional manager. (J.A. 1779). His demotion in 1982 was offered as explanation for why he was not Duke's supervisor in 1985.

Barden did not state or insinuate that he was demoted because of his age.[11]

Respondents will not burden the reader with lengthy distinctions of the cases Uniroyal cites to support its conflict among the circuits. Generally, these cases do not turn on the issue Uniroyal presents, that is, whether there is a sufficient number of adverse employment decisions to support an inference of discrimination.

What Uniroyal has identified is not a true conflict among the circuits, but rather, differing evidentiary considerations under Fed. R. Evid. 403 and 404(b)[12] arising out of the particular facts of each case.[13]

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[11] Similarly, Laube's termination during the 1985 RIF was listed on Uniroyal's Exhibit 110 and was testified to on direct by Uniroyal's manager. (T.T. 1266-67, 1313-14). Tattershall was replaced as regional manager with a person who was newly hired during the 1985 RIF. (J.A. 1719, 2159.)

[12] Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 404(b) provides that evidence of other acts "is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[13] Haskell v. Kaman Corp., 743 F.2d 113, 121-22, 118 (2d Cir. 1984) (error to allow six former employees to testify that they were fired because of age because testimony too remote for probative value to

outweigh the danger of unfair prejudice; ten terminations occurred over an 11-year period; two of ten were never replaced, and five were replaced by older persons). Freeman v. Package Machinery Co., 865 F.2d 1331, 1336-41 (1st Cir. 1988) (statistician's testimony admitted because (1) employer's in limine Fed. R. Evid. 403 motion insufficient to preserve objection, (2) 18-person universe was not a "sample," rather it constituted the entire roster of employees terminated; district judge prohibited discharged employees from testifying that they were terminated because of age; and employer had opportunity to refute evidence and dispute conclusions, and (3) district court has wide discretion under Fed. R. Evid. 403). Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 155-56 (6th Cir. 1988) (testimony of two former employees that they were told they were being terminated because they were too old should have been excluded because it was not relevant (the witnesses were terminated by a different decision maker)) and under Fed. R. Evid. 403. Mundy v. Household Fin. Corp., 885 F.2d 542, 546 (9th Cir. 1988) (summary judgment for employer affirmed; plaintiff, one of five supervisors, discharged for failing to discover that subordinate was stealing funds, but two other supervisors also discharged, age 46 and 35, and one of two supervisors retained was older than plaintiff; discharge of seven other employees in preceeding two years not probative of employer's motives). Pace v. Southern Ry. Sys., 701 F.2d 1383, 1389 (11th Cir. 1983)(summary judgment for employer affirmed; no inference of age discrimination from 12 demotions over a ten year period, where employee failed to show what percentage of employees was over 40). MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1058 (8th Cir. 1988) (judgment for plaintiff affirmed; distinguishes disparate impact cases and cases in which plaintiff's only evidence is statistics in rejecting employer's argument that no inference of discrimination could be drawn from a small number of personnel actions). Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) (judgment for plaintiff affirmed; no Fed. R. Evid. 403 error in admitting testimony of two other employees about circumstances of their terminations where circumstances very similar to plaintiff's, and they occurred in same state during same time period). Goff v. Continental Oil Co., 678 F.2d 593, 596-97 (5th Cir. 1982) (judgment for employer affirmed; harmless error to have excluded testimony of three employees who had never worked with Plaintiff and had no knowledge of his experience or relationship with company).

CONCLUSION

Petitions for writs of certiorari should not be used to delay relief, particularly economic relief under the Age Discrimination in Employment Act. On September 24, 1991, the district judge in this action granted respondent Fox's motion for injunctive relief, thereby prohibiting Uniroyal from severing its ongoing employment relationship with Fox pending the outcome of this Petition and the equity trial ordered by the Fourth Circuit. In granting this relief, the court stated:

> The court fully recognizes and accepts the absolute right of the defendant to fight to the very end before paying one red cent. However, this court is sufficiently knowledgeable of the facts, circumstances, and personalities to recognize that potential grave injustices are beginning to happen to individual citizens by the continued utilization

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Harpring v. Continental Oil Co., 628 F.2d 406, 410, 408-409 (5th Cir. 1980) (judgment for employer affirmed; under Fed. R. Evid. 403, no abuse of discretion to prohibit former employee from testifying about the details of his discharge, although evidence that the witness had been discharged was introduced). Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975, 980-81 (7th Cir. 1984) (summary judgment for employer affirmed; no evidence of pretext; no inference of discriminatory motive solely from fact that three of four terminations were in protected class (out of twelve in that position), because of small sample size and selective manner of categorization). Stumph v. Thomas & Skinner, Inc., 770 F.2d 93, 95, 97-98 (7th Cir. 1985) (summary judgment for employer reversed; direct age-related statements and affidavits of two employees who retired, but who stated that they felt animus from the company because of their age, raised genuine issues of fact).

> and exploitation of every legal right conceivable. This court desires to bring this issue to its conclusion at the earliest possible date so all parties can receive their benefits or discharge their responsibilities in as fair, equitable, and complete a manner as possible. This is not being accomplished when charge after charge is hurled and defense after defense is placed as an impediment.

For the reasons set forth above, the petition for a writ of certiorari should be swiftly denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSE T. DUKE; SIDNEY W. FOX,
Plaintiffs-Appellees,

versus

UNIROYAL INCORPORATED; UNIROYAL CHEMICAL COMPANY, INCORPORATED,
Defendants-Appellants,

and

NORMAN R. BARDEN; JOSEPH R. BISHOP,
Defendants.

Nos. 89-1830, 89-1834, 90-1750 and 90-1757

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge (CA-87-741-5-CIV)

Argued: December 5, 1990 Decided: April 1, 1991

As Amended June 3, 1991

Before SPROUSE and NEIMEYER, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Sprouse and Judge Michael joined.

James Gunter Billings, Kimberly Jo Korando, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, Raleigh, North Carolina, for defendants-appellants.

Lynn Fontana, argued (Joyce L. Davis, Crisp, Davis, Schwentker, Page & Currin, Raleigh, North Carolina, on brief), for plaintiffs-appellees.

Before SPROUSE and NIEMEYER, Circuit Judges, and MICHAEL, District Judge for the Western District of Virginia, sitting by designation.

NIEMEYER, Circuit Judge:

Jesse T. Duke and Sidney W. Fox were discharged from employment with Uniroyal Chemical Company, Inc. on August 15, 1985, as part of a reduction in force. They filed suit, contending that age was a determining factor in the decision to terminate them and that Uniroyal violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§

621-634 (1988). Following a two and one-half week jury trial, the jury returned a verdict and found in favor of Duke in the amount of $181,115 for loss of back pay and $387,216 for loss of future income, often referred to as "front pay." The jury also found in favor of Fox in the amount of $18,480 for back pay and $38,055 for front pay. Finally, the jury found that the violations were not willful and no liquidated damages were awarded. *See* 29 U.S.C. § 626(b). Following the verdict, the district judge denied Fox's motion for reinstatement and entered an award of attorneys' fees and costs in the amount of $298,130.81. 743 F.Supp. 1218.

Uniroyal charges error in virtually every aspect of trial. The numerous issues that it briefed on appeal may be grouped within the following more generalized contentions: (1) the jury verdict was unsupported by substantial evidence of age discrimination; (2) various rulings of the district court on the evidence were improper; (3) the district court abused its discretion in refusing to sever plaintiffs' claims for trial; (4) the instructions to the jury failed to accommodate adequately the particular facts in evidence; (5) front pay should not have been submitted to the jury; and (6) the district court abused its discretion in its award of attorneys' fees. Fox filed a cross appeal, contending that he was improperly denied reinstatement.

For the reasons that follow, we reject all challenges to the fairness of the jury trial and affirm the verdict of the jury except insofar as it awards front pay. We vacate the

awards of front pay and the order denying reinstatement, with instructions to the district court to conduct an equity trial to determine what, if any, equitable relief is appropriate. We affirm the award of attorneys' fees.

I

Duke and Fox were employed with the Crop Protection Division of Uniroyal, Duke as a sales representative of Agri Chemicals in Region 13, and Fox as a sales development representative in Region 13/16. Both were terminated on August 15, 1985, as part of a reduction in force. At the time Duke was 51, having worked with Uniroyal for 16 years, and Fox was 50, having worked for 17 years. At about the same time when Duke and Fox were terminated, Joseph Bishop, 54, was also terminated and Norman R. Barden, 59, elected to take early retirement under a company sponsored program. Although both Bishop and Barden were also plaintiffs in the case below, their claims have since been settled.

Duke, Barden and Bishop were the oldest and longest tenured sales representatives in Region 13, and Fox, who was the only development representative to be terminated, was the oldest and longest tenured development representative in Region 13/16. Six months after Fox was terminated, Uniroyal retained him as an independent consultant, a position that he retained as of trial.

In early 1985, Uniroyal, Inc. was the subject of a hostile takeover attempt that threatened its chemical business. This prompted a leveraged buy out (the LBO) which resulted in the formation of Uniroyal Chemical Company, Inc. The LBO and weakening market conditions caused Uniroyal to restructure and reduce its work force. In selecting those to be terminated, Uniroyal applied employee performance criteria, focusing on the employee's ability to assume greater technical responsibility, demonstrated initiative in increasing sales of small volume products, and past performance ratings. Uniroyal contends that its particular decision to terminate Duke was based on the fact that Duke's territory was eliminated and his customers were assigned to other territories. He was not reassigned because of his performance against the stated criteria. Similarly, Uniroyal claims that Fox was selected for termination because of his weakness in knowledge of herbicides and pesticides, which Uniroyal had decided to promote, and his inability to promote them.

At trial plaintiffs contended that the articulated reasons given by Uniroyal for their terminations were a pretext for age discrimination. They attempted to prove their case by indirect evidence under the procedure established for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). It is unclear whether Uniroyal challenges the sufficiency of plaintiffs' evidence in establishing a prima facie case, but it

adamantly contends that no evidence was presented to prove that its articulated reasons were a pretext. It urges that we reverse the district court's denial of its motion for a directed verdict and motion for judgment notwithstanding the verdict.

[1] When determining whether the evidence is sufficient to support the jury's verdict, the evidence must be reviewed in the light most favorable to plaintiffs, giving them the benefit of all inferences. If, with that evidence, a reasonable jury could return a verdict in favor of plaintiffs, the court must defer to the judgment of the jury, even if the court's judgment on the evidence differs. *See Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S.Ct. 3159, 104 L.Ed.2d 1022 (1989); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 594 (4th Cir. 1985).

[2] In the context of the ADEA, a plaintiff must prove, with reasonable probability, that but for the age of the plaintiff, the employment decision adverse to the plaintiff would not have been made. Age must have been a determining factor. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). That burden may be satisfied, as with any other case, by direct or circumstantial evidence.

[3] Under the method of proof by circumstantial evidence established by *McDonnell Douglas*, when the plaintiff proves a prima facie case of age discrimination, the

burden of going forward shifts to the defendant. If the defendant articulates a legitimate nondiscriminatory reason for the employment action, the plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action. *Hajoca*, 864 F.2d at 319; *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983).

In *Hajoca* and *Western Electric*, we adapted the elements for establishing a prima facie case to a reduction-in-force case brought under the ADEA and stated that the plaintiff must show:

> (1) That he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

Hajoca, 864 F.2d at 319 (citing *Western Elec.*, 713 F.2d at 1014-15).

That precise formulation, however, need not be rigidly applied, and differing factual circumstances may require adaptation. The first two elements -- that a person was in the protected class and suffered an adverse employment action as a result of the reduction in force -- are basic to every ADEA case. The third element, that the employee was performing to his employer's reasonable

expectations, however, is an element that may often become irrelevant. When a reduction in force occurs, the terminated employees may well be performing to expectation, and the discharge of a specified group is driven by economic reasons. In selecting those employees who are to be discharged, employers have applied criteria unrelated to performance, such as by seniority or by department or division, or in response to future expected needs of the company, or by combinations of them. When the selection process is based on performance, the criterion is more a question of relevant performance than one of not meeting employer expectations.

The fourth element outlined in *Hajoca*, that persons not protected by the ADEA were retained or that there was evidence that the employer did not treat age neutrally, often proves difficult to apply. A reduction in force decision may result not only in the elimination of personnel, but also in the elimination of positions by the consolidation of functions, departments and territories. Moreover, such restructuring often causes employee transfers, in lieu of terminations. In these multifaceted circumstances, the question of whether a younger employee has been retained can become murky or even irrelevant. The alternative requirement of showing a lack of age neutrality is a broad criterion that may often be more suited to the method of proof of discrimination by direct evidence.

[4, 5] Under any formulation for establishing a prima facie case, the task of the plaintiff is to prove a set of circumstantial facts which, in the absence of a legitimate non-discriminatory explanation, leads one to conclude with reasonable probability that the adverse employment action was a product of age discrimination. Thus, tailoring the *Hajoca* formulation to this case, where legitimate business reasons led to a reduction of employees in an identified group or territory and the stated criterion for selection was employee performance, we hold that, to prove a prima facie case, the plaintiffs must establish that: (1) they were protected by the ADEA; (2) they were selected from the group or territory for termination; (3) they were performing at a level substantially equivalent to the lowest level of those retained in the group or territory; and (4) the process of selection produced a residual work force of persons in the group or territory containing some unprotected persons who were performing at a level lower than that at which the plaintiffs were performing. Once a prima facie case is established, the employer may articulate a legitimate nondiscriminatory basis of selection, in which case the plaintiff bears the burden of demonstrating that the employer's basis was a mere pretext for discrimination and that age was a determining factor in the selection process.

[6] While Uniroyal's challenge focuses most intensely on whether plaintiffs adequately proved that its articulated reasons were pretextual, it is not clear whether it

concedes a prima facie case was established. However, the evidence supports the conclusion that plaintiffs did establish a prima facie case. Both Duke and Fox were over the age of 40 and protected by the ADEA, and both were involuntarily terminated as sales or development representatives in 1985. Substantial evidence was also offered to show that both Duke and Fox were performing at or better than the lowest level of those retained in the group or territory, although that evidence was disputed. Finally, evidence was offered that those selected for discharge were the oldest in the region and that younger, unprotected persons, who were not performing as well as plaintiffs, were retained or transferred. In addition, plaintiffs offered evidence that Uniroyal did not fully follow its own EEO policy of favoring employees with longevity in reductions in force. Uniroyal conceded in its brief that "[a]t best, such a deviation from its policy would allow the 'but for' inference [of age discrimination] to exist as a mere possibility along with others, such as Uniroyal's desire to use an age-neutral selection process to select the best qualified employees." Brief of Appellants at 32. In the aggregate this proof establishes a prima facie case.

Because Uniroyal articulated legitimate nondiscriminatory reasons for its selection of plaintiffs for discharge, *i.e.* that they were the least qualified for the existing and future needs of Uniroyal, the issue moved to the question of whether the plaintiffs offered substantial proof

from which a reasonable jury could conclude that the articulated reasons were a pretext for age discrimination.

[7, 8] When focusing on the sufficiency of evidence, taken in a light most favorable to plaintiffs, we act clinically in marshalling the evidence presented in favor of plaintiffs and disregard the substance of evidence offered by Uniroyal. We also must assume that the testimony in favor of plaintiffs was credible, unless totally incredible on its face, and ignore evidence offered to rebut it. In so discharging our duty to review the evidence in the light most favorable to plaintiffs, we conclude that evidence was presented from which a reasonable jury could find that Uniroyal's articulated reasons were pretextual. In addition to showing that Uniroyal discharged the oldest sales representatives in Region 13 and the one oldest development representative in Region 13/16, and that it apparently did not fully follow its own EEO policy in recognizing seniority when making reductions in force, the plaintiffs presented evidence that the merit rankings of Uniroyal employees were possibly artificial or irrational. Evidence was also presented showing that the plaintiffs performed better against stated standards than did other employees ranked higher.

In connection with Fox, the plaintiffs proved that several documents relating to the rankings of employees were developed within the termination period and in some cases were questionable. For example, a memorandum was developed just two weeks before Fox was fired, which

described "exciting new chemicals" that purportedly were not within the expertise of Fox but which were to be marketed by Uniroyal. Other evidence, however, tended to show that Fox was familiar with four of the products contained in the memo. Documents which purported to be the rankings of Fox as of October 3, 1983, and September 25, 1984, which concededly were heavily relied on in making the decision to terminate Fox, turned out to be inaccurate documents prepared for litigation. Uniroyal admitted that they had been copied to remove "extraneous" information. When the trial judge halted the trial to obtain the original documents, the original documents were produced and showed that in fact three other employees were ranked below Fox. All of them were younger than Fox, had less experience, and were retained. Plaintiffs also demonstrated that even though Fox was terminated because he was allegedly a lower performer, he was hired six months later as an independent consultant for Uniroyal, a position he continued to hold at the time of trial.

Duke was purportedly selected for termination because his sales position was eliminated. However, evidence was offered that the document showing the elimination of his territory was accurate for a period of perhaps two weeks, and that after his termination more representatives were servicing his region than before. Moreover, it was shown that by August 16, 1985, the day after he was terminated, Duke had already exceeded his overall 1985 sales goals while operating

within expense limits. At the same time, the company's overall performance was lower than planned. Uniroyal representatives also argued that Duke was not sufficiently aggressive, but evidence was offered to show that he in fact doubled the Uniroyal assigned goal for an important product assigned to him and that he had in fact brought in new customers, whereas other sales representatives in the region had brought in none.

The trial was lengthy and the plaintiffs have effectively pointed to other facts to support their position. Considered in the aggregate, the facts presented permit a finding by a reasonable jury that the reasons advanced by Uniroyal were pretextual. Having reached this conclusion, we cannot disturb the verdict of the jury.

II

[9] Uniroyal challenges several rulings by the district court in admitting evidence. The receipt of one document, in particular, raises a significant question of relevance. Plaintiffs offered, and the court admitted, a one-page Uniroyal newsletter article reporting Uniroyal Chairman Joseph P. Flannery's comments concerning the effects of a leveraged buy out on a company. While Uniroyal had justified, in part, its reduction in force on the restructuring that followed the leveraged buy out, Uniroyal argues that the statements of Flannery in the article were not

relevant and were only prejudicial. Uniroyal points particularly to the following excerpts:

> There are, of course, benefits from what has gone on. If you think about world competition a major issue for the U.S. today, the divestment of major units in a leveraged buyout, such as Uniroyal, will surely lead to coupling with similar businesses to make both more competitive in the future. That's good for the business and the employees in those businesses.
>
> On the other hand organizations get ripped apart, staffs eliminated and short-term orientation takes over. Again, each situation is different but this generally happens.
>
> *Shattered Dreams*
>
> I am bothered by what happens to the average employee. Someone expressed it very well -- so many shattered dreams. There are people struggling to survive, to provide for families. I suspect they are not represented here. We do have a responsibility to be concerned about them. Certainly they should not be sacrificed for the benefit of a few, whoever we might be.
>
> The management and employees at Uniroyal who had done the turnaround job should have been allowed to go on. They should have been permitted to share in the

> gains achieved through their sacrifice and hard work.

J.A. 2220.

While we can appreciate the potentially prejudicial effect that this document might have had in distracting jurors from the issues presented for decision, and can even conclude that the better judgment would have been to sustain Uniroyal's objection, in the context of a two and one-half week trial in which over 175 exhibits were admitted and an accumulation of relevant evidence was presented, we find that any error was harmless.

A review of the other rulings made by the district judge on the admissibility of evidence, while at times presenting close questions, does not demonstrate an abuse of the broad discretion given to trial judges in ruling on the evidence.

III

Uniroyal contends that the district court committed reversible error in denying its motion to sever the plaintiffs' trials. It argues that evidence of discrimination as to one employee would not ordinarily be admissible against another, and therefore to try the two employees together was prejudicial, citing *Weir v. Litton Bionetics, Inc.*, 41 Fair Empl.Prac.Cas. (BNA) 1150, 1986 WL 11608 (D.Md. 1986).

Rule 20(a), F.R.Civ.P., provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . . A plaintiff . . . need not be interested in obtaining . . . all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief . . . .

Section (b) of the Rule goes on to provide that the court "may order separate trials or make other orders to prevent delay or prejudice." F.R.Civ.P. 20(b).

Both Duke and Fox were terminated on August 15, 1985, as part of the same reduction in force which was implemented by Uniroyal under a uniform policy adopted for selecting employees for discharge. The reduction was implemented by direction of Uniroyal's national sales manager, Bolton Jones, in consultation with its manager of employee relations, Bob Douglas. Moreover, the decisions with respect to both Duke and Fox were the product of coordinated efforts in the selection of persons for discharge and in making transfers necessitated by restructuring of regions and departments. Plaintiffs' claims arise out of the

same transaction, a single reduction in force, raising common questions of law and fact.

While there was a broad variation of circumstances relating to the merits of the individual performances of each of the plaintiffs, this evidence could be easily distinguished by the jury. The record presents no basis to conclude that the evidence was confusing or that either plaintiff was prejudiced by the evidence submitted by the other.

Moreover, when instructing the jury, the district court was careful to point out that each plaintiff's claim should be considered separately and should rise or fall on the evidence with respect to that plaintiff:

> Where more than one claim is involved, as in this case, you should consider each claim and the evidence pertaining to it separately, as you would, had each claim been tried before you, separately.
>
> * * *
>
> Remember, you are to consider each plaintiff, Mr. Duke and Fox, individually and separately and find and respond to the issues individually.

J.A. 1925, 1929. The court also described the separate claims of each of the plaintiffs to the jury, and the jury was given a form for returning a verdict which called for a separate finding with respect to each plaintiff.

In these circumstances, we hold that the plaintiffs were properly joined and that the court did not abuse its discretion in denying the motion to sever. *See Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988) (denial of severance motion is an abuse of discretion only if denial deprives defendant of fair trial), *cert. denied*, 489 U.S. 1011, 109 S. Ct. 1119, 103 L.Ed.2d 182 (1989).

IV

Uniroyal contends that the district court did not adequately inform the jury of the law or the manner in which to apply the facts to the law.

[11, 12] Uniroyal is correct in pointing out that we have directed that jury instructions be drawn so as to relate to the particular factual circumstances of the case. Abstract propositions of law stated to the jury without regard to the factual circumstances are potentially confusing. *See United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974). On the other hand, district judges are not required to comment on the evidence, and their refusal to single out any particular item of evidence is often a sensible approach to evenhandedness in the presentation of the law. *See Nelson v. Green Ford*, 788 F.2d 205, 208-09 (4th Cir. 1986).

[13] The district court's instructions to the jury in this case do not offend these applicable principles. The court described the background of the ADEA, the nature of the claims of the parties, and the law to be applied. Contrary to

the contention of Uniroyal, the district court did adapt the law to the case. When the district court's instructions are read as a whole, they fairly describe the law that is applicable to the particular claims of the parties in this case, and they were not presented in such an abstract manner as to confuse.

V

Uniroyal contends that the district court improperly submitted to the jury the issues of whether front pay is to be awarded and the amount, if any, to be awarded. It contends that front pay is an aspect of the equitable relief to be considered by the court and therefore should not be considered by the jury. The plaintiffs, on the other hand, contend that the Seventh Amendment guarantees to them a trial by jury on any issue for recovery of dollar amounts owing, including back pay, liquidated damages and front pay, because such amounts are in the nature of legal remedies.

The circuits are divided on this issue. The Third, Sixth, and Ninth Circuits have expressly ruled that the quantification of front pay is a legal question which should be submitted to the jury. *See Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *Fite v. First Tennessee Prod. Credit Ass'n*, 861 F.2d 884, 893 (6th Cir. 1988); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d

1338, 1347 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047, 98 L.Ed.2d 870, 108 S.Ct. 785 (1988). On the other hand, the First, Second, Eighth, and Eleventh Circuits have expressly adopted the position that front pay is an equitable remedy, the amount of which should be left for the court to decide. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985) (district court has discretion to award front pay when reinstatement is impracticable or impossible); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (award of front pay should be made by the court); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982) (district court may grant, as equitable relief, monetary damages in lieu of reinstatement); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988) (award of front pay is equitable relief; district court has discretion whether to grant it and in what form). The Tenth Circuit has not expressly ruled on the issue but it does appear to support the position that the amount of front pay lies in the district court's discretion. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990) (affirming district court's post-trial award of front pay); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1988) (front pay and reinstatement are alternative remedies for making the plaintiff whole). The Fifth and Seventh Circuits have issued conflicting guidance on the issue of whether the judge or the jury should decide the amount of front pay. *Compare Hansard v. Pepsi-Cola Metro.*

Bottling Co., 865 F.2d 1461, 1470 (5th Cir.) (jury determines amount of front pay), *cert. denied*, U.S. , 110 S.Ct. 129, 107 L.Ed.2d 89 (1989), and *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n. 4 (7th Cir. 1987) ("authority and reason" suggest that amount of front pay is a jury question), vacated on other grounds, 486 U.S. 1020, 108 S.Ct. 1990, 100 L.Ed.2d 223 (1988), with *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 824 (5th Cir. 1990) (front pay is equitable remedy and amount is within district court's discretion), and *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989) ("we need not address the difficult question"). The Fourth Circuit has not addressed the issue.

[14] The ADEA was enacted in 1967 to promote the employment of older persons based on their ability rather than their age and to prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621(b). Remedies for violation of the Act are provided in Section 626(b) which provides in part:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

(Emphasis added.) Although front pay is not expressly enumerated, the Act permits a range of equitable and legal remedies to give effect to its purposes. The right to trial by jury is preserved on legal issues. 29 U.S.C. § 626(c)(2). When both legal and equitable remedies are demanded, the appropriate method of proceeding requires submission of the case first to the jury to resolve liability and all legal damages. Thereafter, the court conducts a trial in equity to resolve all issues of equitable relief. *See Ross v. Bernhard*, 396 U.S. 531, 537-38 , 24 L.Ed.2d 729, 90 S.Ct. 733 (1970) ("Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed . . . ."); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959) ("Only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.").

In this case Duke and Fox have requested both legal and equitable remedies, including, among other things, reinstatement, compensation for loss of back pay and benefits, loss of future pay and benefits until retirement, and liquidated damages for willful violations. The district court, determining that front pay was a legal issue, submitted the question of whether it is to be awarded and in what amount to the jury. In addition to awarding Duke and Fox back pay, the jury made separate awards of front pay for anticipated

lost income and benefits from the date of trial until retirement.

Future wages are often determined with reasonable certainty and awarded as legal damages in circumstances where the earning capacity of a plaintiff is destroyed or damaged. In circumstances, however, where employment is terminated without destroying the capacity to work, the nature and extent of injury is nearly indeterminable. The broad array of potential circumstances of a terminated employee's future income makes any attempt at finding damages a speculative venture. The question of whether the discharged employee will ever work again despite his best efforts or will obtain gainful employment in two years, or immediately, is not something that is within the realm of fact finding. To have a jury thus compute a number without regard to reasonably certain predictions of actual injury is foreign to established principles of legal damages.

[15] The appropriate method for addressing the difficult question of providing a remedy which anticipates potential future losses requires an analysis of all the circumstances existing at the time of trial for the purpose of tailoring a blend of remedies that is most likely to make the plaintiff whole. The beginning point under the ADEA for preventing future loss is reinstatement. *See, e.g., Maxfield*, 766 F.2d at 796.

While an employer-employee relationship may not be fully restored to its pre-violation condition by reinstatement,

the chances of a proper restoration are greater than by guessing, with an award of front pay, whether and for how long a plaintiff will work in the future. Under one scenario of future events, the plaintiff could be left without a remedy and under another the plaintiff could end up with a windfall. In either case, an injustice is done to one party or the other.

It is axiomatic, however, that notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate. For example, reinstatement has not been ordered when the employer has demonstrated "such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.), *cert. denied*, 474 U.S. 946, 88 L.Ed.2d 289, 106 S.Ct. 312 (1985). Reinstatement has also been found inappropriate when the litigation itself created such animosity between the parties that any potential employer-employee relationship was irreparably damaged; or when the company was no longer in business; or when the particular business for which the plaintiff was qualified was no longer operating; or when there was no comparable position available. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). Also, when the period for reinstatement was expected to be a relatively short one, such as if the plaintiff was close to retirement, the strong preference in favor of reinstatement has been found to be neutralized by the increased certainty of

the potential loss of pay, permitting consideration of a front pay award. *See e.g., McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041, 95 L.Ed.2d 823, 107 S.Ct. 1983 (1987). Combinations of the factual circumstances noted could lead to awards for temporary periods of front pay, such as a time for retraining the employee if that course is the one more suited to making him or her whole.

[16] When reinstatement is not appropriate, then other remedies may be considered. We join virtually all circuits that have considered the subject in concluding that front pay is an available remedy to complete the panoply of remedies available to avoid the potential of future loss. *E.g., Wildman*, 771 F.2d at 616 (1st Cir.); *Whittlesey*, 742 F.2d at 728 (2d Cir.); *Maxfield*, 766 F.2d at 796 (3d Cir.); *Hansard*, 865 F.2d at 1469 (5th Cir.); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *McNeil*, 800 F.2d at 118 (7th Cir.); *Gibson*, 695 F.2d at 1100 (8th Cir.); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859, 74 L.Ed.2d 113, 103 S.Ct. 131 (1982); *EEOC v. Prudential Fed.*, 763 F.2d at 1172-73 (10th Cir.); *Goldstein v. Manhattan Indus. Inc.*, 758 F.2d 1435, 1448-49 (11th Cir.), *cert. denied*, 474 U.S. 1005, 88 L.Ed.2d 457, 106 S.Ct. 525 (1985); *cf. Taylor v. Home Ins. Co.*, 777 F.2d 849, 860 (4th Cir. 1985) (affirming district court award that included front pay), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986).

The question of who should determine the amount of front pay to be awarded -- the jury or the trial judge -- rests on whether front pay is a legal or equitable remedy. Traditionally, money damages were a "form of relief offered in the courts of law." *Curtis v. Loether*, 415 U.S. 189, 196, 39 L.Ed.2d 260, 94 S.Ct. 1005, 1009 (1974). Money damages, however, are not always legal in nature; a money damages award may be a form of equitable relief if it is "restitutionary" or "incidental to or intertwined with injunctive relief." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 108 L.Ed.2d 519, 110 S. Ct. 1339, 1348 (1990) (citations omitted). For example, in cases brought under Title VII of the Civil Rights Act of 1964, back pay has been characterized by the courts of appeal as "an integral part of an equitable remedy, a form of restitution." *Curtis*, 415 U.S. at 197, 94 S.Ct. at 1010. The characterization is based "on the fact that the decision of whether to award backpay is committed to the discretion of the trial judge." *Id.* In addition, there is a sense that back pay is the method by which the defendant is required to "disgorge funds wrongfully withheld from the plaintiff." *Id.*

[17] Similarly, whether front pay is to be made available to a plaintiff under the ADEA is a matter left to the discretion of the trial judge who must consider a host of factors, including whether reinstatement is practical. While reinstatement, which is clearly an equitable remedy, is the much preferred remedy, front pay may serve as a substitute

or a complement. Because of the potential for windfall, however, its use must be tempered. It can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. If a plaintiff is close to retirement, front pay may be the only practical approach. The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages. Its award, as an adjunct or an alternative to reinstatement, must rest in the discretion of the court in shaping the appropriate remedy. Thus, as with back pay under Title VII, front pay under the ADEA has a restitutionary nature. We conclude therefore that its award and amount is one for the court sitting in equity to consider and not the jury.

In submitting that issue to the jury in this case, the district court permitted awards which did not take into account the discretion, restraint and balance that a court of equity could bring to bear in considering the variations of application. Accordingly, we vacate that part of the jury verdict which is attributable to front pay with the instructions that the district court conduct an equitable hearing to determine, in accordance with the principles outlined in this opinion, whether front pay should be awarded and if so in what amount.

Fox contends also that the court improperly denied him reinstatement and refused to afford him a hearing for

purposes of determining whether reinstatement was appropriate. Because we are directing that an equitable hearing take place and reinstatement is the much preferred remedy for addressing potential future losses which should be considered in tandem with other potential equitable remedies as described herein, our remand order includes the order for the court to reconsider the total equitable remedies available to Fox, including the possibilities of reinstatement, front pay, a combination, or, if appropriate, no remedy.

In remanding this case for an equity trial to determine the appropriate equitable relief, if any, we do not disturb the jury verdict except insofar as we vacate its awards of front pay, which were separately stated.

VI

[18] In their petition for attorneys' fees and costs, Duke and Fox originally claimed fees incurred for the conduct of the trial in the amount of $ 531,465.70 and costs of $ 24,700.98. They later submitted claims for additional fees incurred in prosecuting the fee petition in the amount of $75,235 and costs of $3,193.68. The fees sought included a contingency enhancement. After reviewing the voluminous submissions by the parties and conducting a hearing, the district court awarded plaintiffs $240,960.25 in attorneys' fees, plus $21,447.88 in costs, incurred in connection with the trial and $ 34,050 in fees, plus $1,672.68 in costs, incurred in prosecuting the fee petition.

Uniroyal contends that the award was improperly determined by the district court because the descriptions of time entries supplied by plaintiffs were too generalized, and the court used a method of reducing fees across the board without a sufficiently detailed analysis.

In its opinion in support of its award of attorneys' fees, the district court concluded that it had been presented with "adequate documentation" of the time incurred by counsel for the plaintiffs. It noted that counsel for Uniroyal "have represented to the court that they do not contest the reasonableness of the total number of hours that plaintiffs' attorneys spent on the case." J.A. 812. The parties focused on whether the time incurred with respect to claims which were dismissed by summary judgment and settled before trial should cause a reduction and whether the hourly rates of plaintiffs should be enhanced. Addressing these issues, the court stated:

> [A]fter a review of the timesheets the court finds that a 25% reduction in Stage I [the period from the beginning of the litigation through its summary judgment phase] adequately estimates the time spent on non-prevailing plaintiffs and on the wrongful-discharge claims of the prevailing plaintiffs.
>
> The court finds that a 25% reduction in Stage III [the post-trial motions phase] time is necessary to account for the unsuccessful, post-trial reinstatement/ additur motion of Fox

> and the unsuccessful motions for reconsideration of Bishop and Barden. Time spent on these motions was not related to the success of Fox and Duke in their ADEA claims and is not compensable.

J.A. 814. The district court noted that even though only two of the four plaintiffs were prevailing parties, a direct prorated reduction of 50% would not be appropriate because "it would not be accurate to say that the plaintiffs could have prosecuted the claims of Duke and Fox with only half the labor that they expended in prosecuting the claims of Duke, Fox, Bishop, and Barden." *Id.* The analysis of the district court was well-reasoned and was based not only on its review of the vast volume of data submitted by counsel but also on its own intimate familiarity with the case and on the concessions made by counsel during the attorneys' fee petition phase. The district court was not clearly erroneous in its findings.

The district court also adjusted downward the hourly rates of counsel for the plaintiffs to bring them in line with the relevant market rates in the community. It refused to enhance further the attorneys' fees claim of plaintiffs on grounds of exceptional success and refused a further downward reduction urged by Uniroyal on the basis that documentation was inadequate and that the success was not total. The court's analysis on these issues was thorough and thoughtful, and we find no abuse of discretion. Accordingly, the award of attorneys' fees is affirmed.

VII

In summary, we reject all challenges to the jury phase of trial and affirm the verdict of the jury except insofar as the jury awarded front pay. We affirm the award of attorneys' fees. We vacate the awards of front pay and the district court's order denying Fox reinstatement and remand the case to the district court to conduct an equity trial to determine the appropriate equitable remedies, if any, for all parties in accordance with the principles set forth in this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.